(21,404.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 608.

THE STATE OF OKLAHOMA ON THE RELATION OF CHARLES WEST, ATTORNEY GENERAL, AS SUCCESSOR TO THE TERRITORY OF OKLAHOMA, PLAINTIFF IN ERROR,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 27, 1908.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Chicago, Rock Island and Pacific Railway Company, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error herein filed in the office of the Clerk of the Supreme Court of the State of Oklahoma, wherein the State of Oklahoma on the relation of Chas. West, Attorney General, as successor to the Territory of Oklahoma is Plaintiff in Error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Oklahoma this 5th day of October, 1908.

[Seal Supreme Court, State of Oklahoma.]

R. L. WILLIAMS,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma,
By W. M. BONNER, *Dep.*

City of Guthrie, County of Logan, State of Oklahoma. October 5, 1908.

2 I, the undersigned attorney of record for the defendant in error of the above entitled cause hereby acknowledge service of the above citation, and enter an appearance for said defendant in error in the Supreme Court of the United States.

C. O. BLAKE,
H B. LOW,
Attorney- for Defendant in Error.

Filed Oct. 16, 1908. W. H. L. Campbell, Clerk of the Supreme Court. By —— ——, Deputy.

3 Filed Oct. 16, 1908. W. H. L. Campbell, Clerk of the Supreme Court.

In the Supreme Court of the State of Oklahoma.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

THE STATE OF OKLAHOMA, Successor to the Territory of Oklahoma, *ex Rel.* CHAS. WEST, Attorney General, Defendant in Error.

Petition for Writ of Error.

Comes now the State of Oklahoma, successor to the Territory of Oklahoma on the relation of Chas. West, Attorney General, appellee, and says: That on the 22nd day of June, 1908, the Supreme Court of the State of Oklahoma rendered a final judgment against appellee and thereupon a petition for rehearing was filed, presented, considered and on the 8th day of September, 1908, denied by said court, whereupon said judgment against appellee for a dismissal of said action and for costs and awarding execution thereon as would appear by reference to the record and proceedings in said cause, became final.

That said court is the highest court in said state in which a decision of said suit could be had and your petitioner claims the right to remove said judgment and decree to the Supreme Court of the United States by writ of error under section 709 of the revised statutes of the United States.

That said appellee was and is aggrieved in that in said judgement and the proceedings had prior thereto in this case, certain errors were committed to his prejudice.

4 That said court deprived appellee of the benefit of a right assured it and secured it by the provisions of the statutes of the United States, especially Section 4, Chapter 319, 24 Statutes at large, page 447, being an act approved March 2, 1887, entitled, "An act to grant the right of way through the Indian Territory to the Chicago Kansas and Nebraska Railway and for other purposes," to-wit, the right that the said Railway Company and its successors including the Plaintiff in error, should not charge the inhabitants of the Territory of Oklahoma a greater rate of freight than the rate authorized by the laws of the State of Kansas for services or transportation of the same kind, the said State of Oklahoma being the successor of the said Territory of Oklahoma in said matter, in that in said action in the trial court the claim of the Territory of Oklahoma was based upon said Federal Statute to the effect that the defendant in the lower court had accepted right of way under said statute and was bound by the terms thereof not to charge for freight a greater amount than that authorized by the laws of the State of Oklahoma; and it was in said action in the lower court alleged and claimed that said defendent was charging a greater amount than that authorized

by the laws of the State of Kansas for the transportation of freight of the same kind.

That when said action was pending in the Supreme Court of said State, this appellee therein claimed that it had succeeded to all the rights and privileges of the Territory of Oklahoma, and that the inhabitants of the State of Oklahoma had all the rights granted and secured to the inhabitants of the Territory of Oklahoma. And in its decision the said Supreme Court of the State of Oklahoma decided that said right given by said statute no longer inured to the benefit of the inhabitants of the State of Oklahoma.

That this is an action brought under the statutes of the United States relating to the public lands of the United States, and *and* the control of the same by the Congress of the United States, and
5 the granting of the same to corporations for use as right-of-ways for railways, and under and by virtue of said statutes the said 'State of Oklahoma claims the right to forbid and prevent by injunction the charging, by the railways using the same for right-of-ways, to-wit, the appellant herein, a greater sum than that authorized by the State of Kansas, to-wit, the sums set out in the original petition herein; and that by said action there was drawn in question necessarily the construction of certain of said statutes; and the decision of this court is against the said right claimed by the said State of Oklahoma, appellee, and as the Attorney General thereof prays, contrary to the statutes of the United States relating to the disposition of the public lands thereof, and against the right of said State thereunder, all of which will more fully appear in detail from assignment of errors filed herein.

Wherefore, appellee prays that a writ of error may issue to the Supreme Court of the State of Oklahoma for the correcting of the errors complained of and that a duly authenticated transcript of the records, proceedings and papers herein may be sent to the Supreme Court of The United States.

STATE OF OKLAHOMA, *Appellee,*
By CHAS. WEST, *Attorney General.*

6 Filed Oct. 16, 1908. W. H. L. Campbell, Clerk Supreme Court.

In the Supreme Court of the United States.

THE STATE OF OKLAHOMA on the Relation of CHAS. WEST, Attorney General, as Successor to the Territory of Oklahoma, Plaintiff in Error,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant in Error.

Assignment of Errors.

Comes the Plaintiff in Error in the above entitled cause and avers and shows that in the record and proceedings in said cause the Su-

preme Court of the State of Oklahoma erred to the grievous injury and wrong of the plaintiff in error herein, and to the prejudice, and against the rights of the plaintiff in error in the following particulars, to-wit:

1. The said Supreme Court erred in holding that under the record and pleadings in the case and the statutes and laws of the United States relating thereto, plaintiff in error had not established a right to the relief prayed for and was not entitled to judgment.

2. The said Supreme Court erred in holding that an Act of Congress approved March 2, 1887, entitled "An Act to grant right of way through the Indian Territory to the Chicago, Kansas and Nebraska Railway and for other purposes," 24 Stat. at Large, p. 446, 447, and an Act of Congress approved June 29, 1890, entitled "An Act granting to the Chicago, Kansas and Nebraska Railway Company power to sell and convey to the Chicago, Rock Island
7 and Pacific Railway Company all the railway, property rights and franchises of the Chicago, Kansas and Nebraska Railway Company in the Territory of Oklahoma and in the Indian Territory," 26 Stat. at Large, p. 181, and an Act of Congress approved June 16, 1906, entitled "An Act to enable the people of Oklahoma and the Indian Territory to form a constitution and state government and be admitted into the Union," etc., U. S. Stat. 1905-1906, Part 1, p. 267, and other acts of Congress amendatory, supplementary and auxiliary thereto have each and all of them, as bearing upon the issues herein, since the admission of the said Territories to statehood, become "merely abstract, hypothetical questions, from the determination of which no practical relief can follow."

3. That said Supreme Court erred in holding that said statutes had at the time of said decision no vital force as bearing upon the issues herein.

4. That said Supreme Court erred in holding that said action should be dismissed.

5. That said Supreme Court erred in applying to the decision of the issues herein its erroneous conclusions reached in case No. 2085 of the same name and parties, decided at the same time, in this, to-wit: in holding

(*a*) That all rights saved the Territory of Oklahoma and its inhabitants by the common law and said statutes of the United States named in the specifications of error, Nos. 2 and 3, have been superceded by the constitution and laws of the State of Oklahoma, And

(*b*) That in said action the intra state rates alone are sought to be controlled, and in refusing to apply said statutes at least to interstate rates. And
8 (*c*) That since the suit was filed in said Supreme Court of the Territory of Oklahoma, that the erecting of Oklahoma Territory and Indian Territory into a state has so changed conditions that the settlement of the question of whether the inter and intra state rates complained of should be enjoined could serve no useful purpose. And

(*d*) That the admission of said Territory to statehood so changed

the relations to the state of the common carriers doing business therein that the cause ought to be dismissed. And

(*e*) That the relations of the common carriers doing business in the state to the state is so dissimilar from the relations of the said carriers to the territories out of which said state was formed, that the statutes controlling the actions of the carriers toward the said Territories and their inhabitants were inapplicable to the relation of the said carriers towards the State and its inhabitants.

6. That said Supreme Court erred in reversing the judgment of the trial court and dissolving the order of injunction therein.

7. That said Supreme Court erred in not sustaining the order of the trial court enjoining the defendant therein as therein prayed.

That all of said errors were made in the determination of questions necessarily to be determined therein by them and each and all of such determinations had and have the necessary effect of depriving this plaintiff in error of a right guaranteed and secured
9 it by the laws of the United States and such is necessarily determinative of the construction of a law of the United States in such manner as to deny to plaintiff in error a right claimed by it under such laws.

Wherefore, for these and other manifest errors appearing in the record the said State of Oklahoma on the relation of Chas. West, Attorney General, as successors to the Territory of Oklahoma, Plaintiff in Error, prays that the judgment of said Supreme Court of the State of Oklahoma be reversed and set aside and held for naught, and that judgment be rendered for plaintiff in error granting to it its rights under the statutes and laws of the United States, and plaintiff in error also prays judgment for his costs.

CHAS. WEST,
Attorney General of the State of Oklahoma.

Guthrie, Oklahoma.

10 Filed Oct. 16, 1908. W. H. L. Campbell, Clerk of the Supreme Court.

In the Supreme Court of the State of Oklahoma.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
THE STATE OF OKLAHOMA, Successor to the Territory of Oklahoma *ex Rel.* CHAS. WEST, Attorney General, Defendant in Error.

Allowance of Writ.

Comes now the State of Oklahoma, successor to the Territory of Oklahoma, on the relation of Chas. West, Attorney General, the appellee above named, on this 5 day of October, 1908, and files and presents to this court, his petition praying for an allowance of a writ of error intended to be urged by him; and praying further that

a duly authenticated transcript of the records, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this court desiring to give petitioner an opportunity to test in the Supreme Court of the United States, the questions there presented, it is ordered by this court that a writ of error be allowed, as prayed, provided, however, that said State of Oklahoma give bond according to law in the sum of Five Hundred Dollars ($500.00) that it will duly prosecute its writ of error to effect and answer all costs for damages that may be adjudged if it shall fail to make good its plea.

11 In testimony whereof, witness my hand this 5th day of October, 1908.

R. L. WILLIAMS,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:
W. H. L. CAMPBELL,
Clerk Supreme Court,
By W. M. BONNER.
[SEAL.]

12 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oklahoma, before you, at the June sitting of the May term, 1908, and at the September sitting of the September term, 1908, thereof, being the highest court of law or equity of said state in which a decision could be had in the said suit between the Chicago, Rock Island & Pacific Railway Company, plaintiff and appellant, and the Territory of Oklahoma, appellee, wherein the State of Oklahoma as successor to the Territory of Oklahoma asserted a right under a statute of the United States, and the construction thereof was thereby necessarily drawn in question, and the decision was in denial of the right so contended for, so especially set up and claimed under said statute, a manifest error hath happened to the great damage of the State of Oklahoma as by its claim appears.

We being willing that error, if any hath been, should be duly corrected, and fully and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ,

13 so that you have the same in the said Supreme Court at Washington within thirty days from the date thereof, that the record and proceedings aforesaid being inspected, the said Su-

preme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 5 day of October, A. D. 1908.

Done in the City of Guthrie, County of Logan, Oklahoma with the seal of the Circuit Court of the United States for the Western District of Oklahoma attached.

[The Seal of the Circuit Court of the United States, Western District of Oklahoma.]

HARRY L. FINLEY,
Clerk of the Circuit Court of the United States for the Western District of Oklahoma.

Allowed by
R. L. WILLIAMS,
Chief Justice of the Supreme Court of Oklahoma.

Filed Oct. 16, 1908.

W. H. L. CAMPBELL,
Clerk of the Supreme Court,
By —— ——, *Deputy.*

14 In the Supreme Court of the United States.

THE STATE OF OKLAHOMA on the Relation of CHAS. WEST, Attorney General, as Successor to the Territory of Oklahoma, Plaintiff in Error,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant in Error.

Bond.

Know all men by these presents, That the State of Oklahoma is held and firmly bound unto the above named Chicago, Rock Island & Pacific Railway Company in the sum of Five Hundred Dollars ($500.00) to be paid to it and for the payment of which well and truly to be made it is bound by these presents.

Sealed with our seals and dated the 5 day of October, A. D. 1908.

Whereas, the above named State of Oklahoma, plaintiff in error seeks to prosecute its writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Oklahoma.

Now, therefore, the conditions of this obligation are such that if the above named plaintiff in error shall prosecute *his* writ of error to effect and answer all costs and damages that may be adjudged if *he* shall fail to make good *his* plea, then this obligation to be void, otherwise to remain in full force and virtue.

THE STATE OF OKLAHOMA,
By CHAS. WEST, *Attorney General.*

15 This bond approved this 5th day of October, 1908.

R. L. WILLIAMS,
Chief Justice of the Supreme Court of the State of Oklahoma.

16 In the Supreme Court of the Territory of Oklahoma.

No. 2086.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
THE TERRITORY OF OKLAHOMA, Defendant in Error.

Petition in Error.

Comes now the above named plaintiff in error and complaining to the said court states that on the 19th day of October, 1906, there was made and entered in the District Court of Garfield County, Oklahoma Territory, an order of the judge of the said court, the Honorable Milton J. Garber, at Chambers in the City of Watonga, in the County of Blaine, enjoining the said plaintiff in error, a true copy of which said order is contained in the full, true and correct transcript of the whole record in said cause duly certified by the Clerk of said court, and filed herewith.

That there is error in the record and proceedings in the said cause by which the substantial rights of the said plaintiff have been prejudiced, in this:

First. The said court had no jurisdiction of the subject of said action.

Second. The Territory of Oklahoma had no capacity to sue in the said action, or maintain the said action.

Third. The Attorney General of said Territory had no authority to maintain the said action.

Fourth. The said petition does not state facts sufficient to constitute a cause of action.

17 Wherefore, the said plaintiff in error asks that the said injunction order be vacated, and that the District Court be directed to dismiss the said action, and that such further and additional orders be made and entered in the said cause as to this court may seem proper.

CHICAGO, ROCK ISLAND & PACIFIC RY. CO.,
By C. O. BLAKE,
E. E. BLAKE,
H. B. LOW,
M. A. LOW,
Attorneys for Plaintiff in Error.

Filed Feb. 2, 1907.
BENJ. F. HEGLER,
Clerk Supreme Court.

18 TERRITORY OF OKLAHOMA,
County of Garfield, ss:

In the District Court.

No. 2491.

THE TERRITORY OF OKLAHOMA, Plaintiff,
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Petition.

The plaintiff says that it is a Territory of the United States, organized and incorporated under the acts of Congress of the United States and entitled to sue in the courts therein established, and in all other competent courts. That the defendent is a railroad corporation organized and incorporated under the laws of one or more of the States or Territories of the United States, which one is unknown to the plaintiff That the said defendent is operating a line of railroad through the County of Garfield and other portions of the Territory of Oklahoma.

That by act of Congress contained in volume 26 of the statutes at large, page 181, defendent Chicago, Rock Island and Pacific Railroad Company, was granted and undertook all the burdens and rights granted to and imposed upon the Chicago, Kansas and Nebraska Railway Company, a corporation heretofore organized and incorporated under the laws of one of the States or Territories of the United States, which one is unknown to plaintiff. That said last named corporation Chicago, Kansas and Nebraska Railway Company, were granted right of way through the Territory of Oklahoma upon certain conditions; that all of these rights and conditions were transferred to defendent; that among said conditions by said act of Congress it was enacted that said defendent should not charge the inhabitants of said Territory a greater rate of freight than the rate authorized by the laws of the State of Kansas for service
19 of transportation of same kind; that by the laws of the State of Kansas a rate for transportation of freight, to-wit, wheat, in said State is—

For	25	miles	6	cents	per	hundred	pounds.
"	30	"	6½	"	"	"	"
"	35	"	7	"	"	"	"
"	45	"	7½	"	"	"	"
"	50	"	8	"	"	"	"
"	55	"	8	"	"	"	"
"	75	"	8½	"	"	"	"
"	85	"	9½	"	"	"	"
"	95	"	10	"	"	"	"
"	105	"	10½	"	"	"	"
"	115	"	11	"	"	"	"
"	125	"	11½	"	"	"	"
"	135	"	12½	"	"	"	"
"	150	"	14	"	"	"	"
"	200	"	15¼	"	"	"	"

That said defendent in violation of the said conditions under which it now occupies its right-of-way, and in violation of said acts of Congress, and in violation of law, and in violation of the rights of plaintiff and of the inhabitants of said Territory of Oklahoma and the shippers of wheat therein now charges for transportation of wheat according to its local distance tariff *for*—

For	25	miles	7	cents	per	hundred	pounds.
"	30	"	7½	"	"	"	"
"	35	"	8	"	"	"	"
"	45	"	8½	"	"	"	"
"	0	"	9	"	"	"	"
"	55	"	9	"	"	"	"
"	75	"	9½	"	"	"	"
"	85	"	10½	"	"	"	"
"	95	"	11	"	"	"	"
"	105	"	11½	"	"	"	"
"	115	"	12	"	"	"	"
"	125	"	12½	"	"	"	"
"	135	"	13½	"	"	"	"
"	150	"	14½	"	"	"	"
"	200	"	15½	"	"	"	"

That the demand, collection, and receiving by defendent of said charges last enumerated, in so far as they are larger than those authorized by the laws of the State of Kansas, for the shipping of wheat, is an unlawful act and omission which renders other persons, to-wit,—the inhabitants of said Territory of Oklahoma and the shippers therein and the Territory of Oklahoma insecure in the use of their property, to-wit—the public right to ship wheat over defendent's line at a rate not exceeding that authorized by laws of the State of Kansas as aforesaid and the maintenance of said demand and collection and receipt of said overcharges by said defendent is a public and common nuisance.

That the defendent is a common carrier of freight in said Territory, and in said County of Garfield, and the maintenance of said common nuisance is an irremediable injury to the plaintiff against which it has no adequate remedy at law; that said offense continues daily and is daily committed by defendent, and the defendent threatens to continue the same indefinitely.

That said charging, collection and receiving by said defendent of said rate of tariff in addition to said rates authorized by the laws of the State of Kansas grossly injures the person and property of said inhabitants of the Territory of Oklahoma and of this plaintiff, and by reason of the multiplicity of said acts plaintiff has no remedy according to the course of common law.

Wherefore, plaintiff asks that defendent be forever restrained and enjoined from demanding, collecting, receiving or charging, directly or indirectly, for the transportation of freight and goods, according to local distance rates more than—

6	cents	per	hundred	pounds	for	25	miles.
6½	"	"	"	"	"	30	"
7	"	"	"	"	"	35	"
7½	"	"	"	"	"	45	"
8	"	"	"	"	"	50	"
8	"	"	"	"	"	55	"
8½	"	"	"	"	"	75	"
9½	"	"	"	"	"	85	"
10	"	"	"	"	"	95	"
10½	"	"	"	"	"	105	"
11½	"	"	"	"	"	115	"
11½	"	"	"	"	"	125	"
12½	"	"	"	"	"	135	"
14	"	"	"	"	"	150	"
15¼	"	"	"	"	"	200	"

and for such other relief as the equity of the case may warrant, and for costs of this action.

21 TERRITORY OF OKLAHOMA,
By W. O. CROMWELL, *Attorney General and*
C. J. WEST, *Special Attorney General.*

TERRITORY OF OKLAHOMA,
County of Garfield, ss:

W. O. Cromwell, being first duly sworn, upon his oath says that he is Attorney General of Oklahoma, and has read the foregoing petition, and that the facts as therein stated are true as he is reliably informed and verily believes.

W. O. CROMWELL.

Subscribed and sworn to before me this 10th day of Oct. 1906.
[SEAL.] DORA THEIS,
Notary Public.

My Commission Expires May 15, 1909.

(Endorsed:) Filed Oct. 10, 1906, V. W. Whiting, Clerk, By J. M. Fillebrown, Deputy.

22 In the District Court of the Fifth Judicial District of Oklahoma in and for Garfield County, Sitting with Powers of a District and a Circuit Court of the United States of America.

The Territory of Oklahoma to the Sheriff of Garfield County, Oklahoma, Greeting:

You are hereby commanded to notify Chicago Rock Island and Pacific Railway that it has been sued by the Territory of Oklahoma in the District Court in and for the said County of Garfield and that unless it answer by the 2 day of November A. D. 1906, the said peti-

tion of the said plaintiff against it filed in the Clerk's Office of said Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 13 day of October A. D. 1906.

In testimony whereof, I have hereunto set my hand, and affixed the seal of *of* the said Court, at my office in the City of Enid, Garfield County, Oklahoma, this 10 day of October A. D. 1906.

[SEAL.] V. W. WHITING, *Clerk*,
By J. M. FILLEBROWN, *Deputy*.

TERRITORY OF OKLAHOMA,
Garfield County, ss:

Received this Writ Oct. 10, 1906, and as commanded therein, on the 10th day of October 1906 in my county I served the same upon the defendant Chicago Rock Island and Pacific Railway. I delivered a true and correct copy of the within summons with all endorsements thereon duly certified to W. E. Bennett, the agent to sell tickets, freight agent, station keeper of defendant at the depot of defendant in Enid, Oklahoma, the President, Vice President, Chiarman of Board of Directors, Manager, Cashier, Secretary or other chief or managing officer or agent of defendant not being found in my county and defendant having failed to designate or file in the office of the Clerk of the District Court of Oklahoma of Garfield County, the name of some person upon whom service process could be made.

S. C. CAMPBELL,
By J. A. WILCOX, *Deputy*.

Sheriff's Fees.

Service and return, first person	.50
1 Cop. summons	.25
Total	.75

Endorsed: No. 2491. District Court of Garfield County, Oklahoma. The Territory of Oklahoma *vs.* Chicago Rock Island and Pacific Railway. Issued Oct. 10, 1906. Returnable Oct. 13, 1906. Ans. due Nov. 2, 1906. Filed Oct. 11, 1906. V. W. Whiting, Clerk, by J. M. Fillebrown, Deputy. I herewith certify the within to be a true copy of the original summons, with all the endorsements thereon. Seal. V. W. Whiting, Clerk. J. M. Fillebrown, Deputy.

23 TERRITORY OF OKLAHOMA,
County of Garfield, ss:

In the District Court.

No. 2491.

THE TERRITORY OF OKLAHOMA, Plaintiff,
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY, Defendant.

Notice.

Defendant will take notice that Thursday, October 18th, 1906, at 2 P. M., at chambers before the judge of said Court in Watonga, Plaintiff will apply to said court for an allowance of a temporary writ of injunction herein as prayed for in the petition.

That depositions and oral evidence will be submitted in support of said application.

TERRITORY OF OKLAHOMA,
By W. O. CROMWELL,
Attorney General.
C. J. WEST,
Special Att'y for Plaintiff.

Received this notice October 15th, 1906, and on October 15th, 1906, in my County I served the same upon the defendant Chicago, Rock Island and Pacific Railway by delivering a true and correct copy of the within notice to W. E. Bennett the Agent to sell tickets, freight agent Station keeper of the defendant at the depot of defendant in Enid, Oklahoma, the President, Vice President, Chairman of Board of Directors, General Manager, Cashier, Secretary or other chief or managing officer or agent of defendant not being found in my county and defendant having failed to designate or file in the office of the Clerk of the District Court of Oklahoma, of Garfield County, the name of some person upon whom service of process could be made.

S. C. CAMPBELL,
Sheriff of Garfield County,
By CHAS. CAMPBELL, *Deputy.*

Service ..... .50
One copy ..... .25

.75

Endorsed: Filed Oct. 19, 1906. V. W. Whiting, Clerk, by J. M. Fillebrown, Deputy.

24 In the District Court of Garfield County, Oklahoma Territory.

No. 2491.

TERRITORY OF OKLAHOMA, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

Answer.

Comes now the above named defendant, and for answer to the petition herein filed,

First. Denies each and every allegation of the said petition contained and not hereinafter specifically admitted.

Second. Said defendant further answering says that the said court has no jurisdiction of the subject matter of said action, said jurisdiction being vested exclusively in the Interstate Commerce Commission of the United States and the Circuit Court of the United States.

Third. Said Defendant further answering states that the Attorney General of the said Territory has no jurisdiction or authority to commence, maintain or prosecute the said action, for the reason that under the acts of Congress relating to the subject matter of the said action jurisdiction and authority to commence, maintain and control the said action is vested exclusively in the Inter-state Commerce Commission of the United States and the Attorney General of the United States.

M. A. LOW,
BLAKE AND BLAKE.
ROBBERTS & CURRAN,
I. G. CONKLING,
Attorneys for Defendant.

Endorsed: Filed Oct. 16, 1906. V. W. Whiting, Clerk, J. M. Fillebrown, Deputy.

25 TERRITORY OF OKLAHOMA,
County of Garfield, ss:

In the District Court.

THE TERRITORY OF OKLAHOMA, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Reply.

Comes now the plaintiff and for reply denies each and every material allegation of new matter in the answer of defendant contained.

TERRITORY OF OKLAHOMA,
By W. O. CROMWELL,
Attorney General, and
C. J. WEST, *Spec. Att'y General.*

Endorsed: Filed Oct. 27, 1906. V. W. Whiting, Clerk, by J. M. Fillebrown, Deputy.

26 TERRITORY OF OKLAHOMA,
County of Garfield:

In the District Court.

No. 2491.

TERRITORY OF OKLAHOMA, Plaintiff,
vs.
CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY, a Corporation, Defendant.

Order Allowing Temporary Writ of Injunction.

And, now, on this October 19th, 1906, the plaintiff being present by W. O. Cromwell, Attorney General, and Charles West, Special Attorney, and the defendant by C. O. Blake, its Attorney, the application of plaintiff for Temporary Order of Injunction comes on to be heard, both parties offered evidence, and each rested, and the court finds for the plaintiff and against the defendant that the allegations of the petition and its application are true, and that the plaintiff should have a temporary Writ of Injunction, as prayed in the petition.

It is therefore considered, ordered and adjudged by the court that the defendant, Chicago, Rock Island and Pacific Railway be restrained and enjoined from demanding, collecting, receiving or charging directly or indirectly for the transportation of freight upon its local distance rates more than 6 cents per hundred pounds for 25 mile haul of wheat shipped in car load lots, 6½ cents per hundred pounds for 30 miles, 7 cents per hundred pounds for 35 miles, 7½ cents per hundred pounds for 50 miles, 8 cents per hundred pounds for 55 miles, 8½ cents per hundred for 75 miles, 9½ cents per hundred pounds for 85 miles, 10 cents per hundred pounds for 95 miles, 10½ cents per hundred pounds for 105 miles, 11 cents per hundred pounds for 115 miles, 11½ cents per hundred pounds for 125 miles, 14 cents per hundred pounds for 135 miles, 14½ cents per hundred pounds for 150 miles, 15¼ cents per hundred pounds for 200 miles;
27 and that higher than the said rates be not charged, collected or demanded for any distance less than five miles short of the distances named above; and that the same be in force and effect until the further order of the court herein, and until the final hearing of this case, without bond—to which the defendant excepted at the time by its attorney, and upon application, for good cause, was given 60 days to serve case made for appeal to the Supreme Court, and the plaintiff 15 days after service of the same to suggest amendments thereto, and the same to be signed and settled upon 5 days' notice in writing by either party.

That this order shall not take effect until the expiration of the time so allowed to make and settle said cause, and 17 days additional time to file said appeal.

M. C. GARBER, *Judge.*

C. J. WEST,
For Plaintiff.

Endorsed: Filed Oct. 20, 1906. V. W. Whiting, Clerk, by J. M. Fillebrown, Deputy. Filed Feb. 2, 1907. Benj. F. Hegler, Clerk Supreme Court.

28 TERRITORY OF OKLAHOMA,
Garfield County, ss:

I, Vernon W. Whiting, clerk of said court, do, under the authority of my office, hereby certify that the foregoing transcript in said cause entitled The Territory of Oklahoma, Plaintiff, *vs.* Chicago, Rock Island and Pacific Railway Company, defendant, and numbered 2491, is a full, true and complete transcript of the whole record and of the record of the proceedings, and all of the papers in said cause as appears from the records in the office of the Clerk of said Court in the said cause. That I have carefully compared same with the record in said cause, and find the same to be a correct copy thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of my office this 8th day of January, A. D. 1907.

[SEAL.] VERNON W. WHITING,
Clerk, District Court, Garfield County, Oklahoma Territory.

Filed Feb. 2.
BENJ. F. HEGLER,
Clerk Supreme Court.

Endorsed on back: No. 2086. The Chicago, Rock Island & Pacific Ry. Co. *vs.* The Territory of Oklahoma. Petition in error and Transcript. Filed Feb. 2, 1907. Benj. F. Hegler, Clerk Supreme Court. Filed Jan. 8, 1907. V. W. Whiting, Clerk.

29 Supreme Court, June Term, 1907, June 4, 1907, First Judicial Day.

2086.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
THE TERRITORY OF OKLAHOMA, Defendant in Error.

Ordered by the court, that this cause be now passed.

30 Supreme Court, May Term, 1908, May 15, 1908, Fourth Judicial Day.

2086.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
TERRITORY OF OKLAHOMA, Defendant in Error.

And now this cause is orally argued by counsel, and cause is submitted on the record, briefs and oral argument herein.

31 Supreme Court, May Term, 1908, June 22nd, 1908, Seventeenth Judicial Day.

2086.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
THE TERRITORY OF OKLAHOMA, Defendant in Error.

And now this cause comes on for final decision and determination by the court, upon the record and briefs submitted herein.

And the court having duly considered the same, and being fully advised in the premises, finds: That this cause should be dismissed.

It is therefore ordered and adjudged by the court, that this cause be and the same is hereby dismissed.

Opinion by Kane, J. All the Justices concur.

32 Supreme Court, September Term, 1908, September 8th, 1908, First Judicial Day.

2086.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
THE TERRITORY OF OKLAHOMA, Defendant in Error.

Ordered by the court that the petition of defendant in error for rehearing in the above cause be and the same is hereby denied.

33 In the Supreme Court of the State of Oklahoma.

Filed June 22, 1908.

No. 2086.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

THE TERRITORY OF OKLAHOMA, Defendant in Error.

The Supreme Court will not decide abstract or hypothetical cases disconnected from the granting of actual relief, or from the determination of which no practical relief can follow.

(*Syllabus by the Court.*)

Error from the District Court of Garfield County.

Before M. C. Garber, Trial Judge.

Dismissed.

M. A. Low, Blake, Blake & Low, J. C. Roberts and I. G. Conkling, Attorneys for plaintiff in Error.

Charles West, Attorney General, W. O. Cromwell, ex-Attorney General, and Fred M. Elkin, Attorneys for Defendant in Error.

Opinion of the Court by KANE, *J.*:

This was a suit praying for an injunction, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, in the District Court of Garfield County, Oklahoma Territory. The facts, as disclosed by the petition, are as follows:

"The plaintiff says that it is a Territory of the United States organized and incorporated under the acts of Congress of the United States, and entitled to sue in the courts therein established, and in all other competent courts.

34 "That the defendant is a railroad corporation organized and incorporated under the laws of one or more of the states or territories of the United States, which one is unknown to the plaintiff. That the said defendant is operating a line of railroad through the County of Garfield and other portions of the Territory of Oklahoma.

"That by act of Congress contained in volume 26 of the Statutes at Large, page 181, defendant, Chicago, Rock Island & Pacific Railway Company, was granted and undertook all the burdens and rights granted to and imposed upon the Chicago, Kansas & Nebraska Railway Company, a corporation heretofore organized and incorporated under the laws of one of the states or territories of the United States,

which one is unknown to plaintiff. That said last named corporation, Chicago, Kansas & Nebraska Railway Company were granted right of way through the Territory of Oklahoma upon certain conditions; that all of those rights and conditions were transferred to defendant; that among said conditions by said act of Congress it was enacted that said defendant should not charge the inhabitants of said territory a greater rate of freight than the rate authorized by the laws of the state of Kansas for services of transportation of same kind; that — the laws of the state of Kansas a rate for transportation of freight, to-wit, wheat, in said state is:

"For 25 miles 6 cents per hundred pounds.
For 30 miles 6½ cents per hundred pounds.
For 35 miles 7 cents per hundred pounds.
For 45 miles 7½ cents per hundred pounds.
For 50 miles 8 cents per hundred pounds.
For 55 miles 8 cents per hundred pounds.
For 75 miles 8½ cents per hundred pounds.
35 For 85 miles 9½ cents per hundred pounds.
For 95 miles 10 cents per hundred pounds.
For 105 miles 10½ cents per hundred pounds.
For 115 miles 11 cents per hundred pounds.
For 125 miles 11½ cents per hundred pounds.
For 135 miles 12½ cents per hundred pounds.
For 150 miles 14 cents per hundred pounds.
For 200 miles 15¼ cents per hundred pounds.

"That said defendant, in violation of the said conditions under which it now occupies its right of way, and in violation of said acts of Congress, and in violation of law, and in violation of the rights of plaintiff and of the inhabitants of said Territory of Oklahoma and the shippers of wheat therein, now charges for transportation of wheat according to its local distance tariff *for*

"For 25 miles 7 cents per hundred pounds.
For 30 miles 7½ cents per hundred pounds.
For 35 miles 8 cents per hundred pounds.
For 45 miles 8½ cents per hundred pounds.
For 50 miles 9 cents per hundred pounds.
For 55 miles 9 cents per hundred pounds.
For 75 miles 9½ cents per hundred pounds.
For 85 miles 10½ cents per hundred pounds.
For 95 miles 11 cents per hundred pounds.
For 105 miles 11½ cents per hundred pounds.
For 115 miles 12 cents per hundred pounds.
For 125 miles 12½ cents per hundred pounds.
For 135 miles 13½ cents per hundred pounds.
For 150 miles 14½ cents per hundred pounds.
For 200 miles 15½ cents per hundred pounds.

36 "That the demand, collection, and receiving by defendant of said charges last enumerated, in so far as they are larger than those authorized by the laws of the State of Kansas, for the shipping of wheat, is an unlawful act and omission which renders other persons, to-wit, the inhabitants of said Territory of Oklahoma

and the shippers therein and the Territory of Oklahoma insecure in the use of their property, to-wit, the public right to ship wheat over defendant's line at a rate not exceeding that authorized by the laws of the state of Kansas as aforesaid; and the maintenance of said demand and collection and receipt of said overcharges by said defendant is a public and common nuisance.

"That defendant is a common carrier of freight in said Territory and in said county of Garfield, and the maintenance of said common nuisance is an irremediable injury to the plaintiff against which it has no adequate remedy at law; that said offence continues daily and is daily committed by defendant, and defendant threatens to continue the same indefinitely.

"That said charging, collecting and receiving by said defendant of said rate of tariff in addition to said rates authorized by the laws of the state of Kansas grossly injures the person and property of said inhabitants of the Territory of Oklahoma and of this plaintiff, and by reason of the multiplicity of said acts plaintiff has no remedy according to the course of common law.

"Wherefore plaintiff asks that defendant be forever restrained and enjoined from demanding, collecting, receiving or charging, directly or indirectly, for the transportation of freight and goods, according to local distance rates more than—

37 "6 cents per hundred pounds for 25 miles.
6½ cents per hundred for 30 miles.
7 cents per hundred pounds for 35 miles.
7½ cents per hundred pounds for 45 miles.
8 cents per hundred pounds for 50 miles.
8 cents per hundred pounds for 55 miles.
8½ cents per hundred pounds for 75 miles.
9½ cents per hundred pounds for 85 miles.
10 cents per hundred pounds for 95 miles.
10½ cents per hundred pounds for 105 miles.
11½ cents per hundred pounds for 115 miles.
11½ cents per hundred pounds for 125 miles.
12½ cents per hundred pounds for 135 miles.
14 cents per hundred pounds for 150 miles.
15¼ cents per hundred pounds for 200 miles.

And for such other relief as the equity of the same may warranty, and for costs of this action."

To this petition the defendant filed its answer, in words and figures as follows, to-wit:

"Comes now the above named defendant, and for answer to the petition herein filed

"First. Denies each and every allegation of the said petition contained and not hereinafter specifically admitted.

"Second. Said defendant further answering says that the said court has no jurisdiction of the subject matter of said action, said jurisdiction being vested exclusively in the Interstate Commerce Commission of the United States and the Circuit Courts of the United States.

"Third. Said defendant further answering states that the Attorney

General of the said Territory has no jurisdiction or authority
38 to commence, maintain or prosecute the said action for the reason that under the acts of Congress relating to the subject matter of the said action, jurisdiction and authority to commence, maintain and control said action is vested exclusively in the Interstate Commerce Commission of the United States and the Attorney General of the United States."

Thereafter on the 19th day of October, 1906, pursuant to notice served, and application for a temporary injunction as prayed for in the petition was heard, which application was by the court granted and an order issued and entered, in words and figures, as follows:

"And now, on this October 19th, 1906, the plaintiff being present by W. O. Cromwell, Attorney General, and Charles West, Special Attorney, and the defendant by C. O. Blake, its attorney, the application of the plaintiff for Temporary Order of Injunction comes on to be heard both parties offered evidence, and each rested, and the court finds for the plaintiff and against the defendant that the allegations of the petition and its application are true, and that the plaintiff should have a Temporary Writ of Injunction, as prayed in the petition.

"It is therefore considered, ordered and adjudged by the court that the defendant, Chicago, Rock Island & Pacific Railway, be restrained and enjoined from demanding, collecting, receiving or charging directly or indirectly for the transportation of freight upon its local distance rates more than 6 cents per hundred pounds for 25 miles haul of wheat shipped in car load lots 6½ cents per hundred pounds for 30 miles, 7 cents per hundred pounds for 35 miles, 7½ cents per hundred pounds for 50 miles, 8 cents per hundred pounds
39 for 55 miles, 8½ cents per hundred pounds for 75 miles, 9½ cents per hundred pounds for 85 miles, 10 cents per hundred pounds for 95 miles, 10½ cents per hundred pounds for 105 miles, 11 cents per hundred pounds for 115 miles, 11½ cents per hundred pounds for 125 miles, 14 cents per hundred pounds for 135 miles, 14½ cents per hundred pounds for 150 miles, 15¼ cents per hundred pounds for 200 miles; and that higher than the said rate be not charged, collected or demanded for any distance less than five miles short of the distance named above; and that the same be in force and effect until the further order of the court herein, and until the final hearing of this case, without bond—to which the defendant excepted at the time by its attorney and upon application, for good cause, was given 60 days to serve case made for appeal to the Supreme Court, and the plaintiff 15 days after service of the same to suggest amendments thereto, and the same to be signed and settled upon five days' notice in writing by either party.

"That this order shall not take effect until the expiration of the time so allowed to make and settle said case, and 17 days' additional time to file said appeal."

From the foregoing order the defendant appealed to the Supreme Court of the Territory of Oklahoma, and the case was transferred to the Supreme Court of the State under terms of the Enabling Act and the Schedule to the Constitution.

The part of the act of Congress under which the relief prayed for was granted reads as follows:

"That said railroad company shall not charge the inhabitants of said Territory a greater rate of freight than the rate authorized by the laws of the state of Kansas for services or transportation of the same kind: Provided, That passenger rates on said railway
40 shall not exceed three cents per mile. Congress hereby reserves the right to regulate the charges for freight and passengers on said railway and message on said telegraph and telephone lines, until a State government or governments shall exist in said territory within the limits of which said railway, or a part thereof, shall be located: and then such State government or governments shall be authorized to fix and regulate the cost of transportation of persons and freights within their respective limits by said railway; but Congress expressly reserves the right (to) fix and regulate at all times the cost of such transportation by said railway or said company whenever such transportation shall extend from one State into another, or shall extend into more than one state: Provided, however, That the rate of such transportation of passengers, local or inter-state, shall not exceed the rate above expressed: And provided further, That said railway company shall carry the mail at such prices as Congress may be law provided; and until such rate is fixed by law the Postmaster General may fix the rate of compensation." Sec. 4, Chap. 319, 24 Stat. at Large, page 447.

Practically the same questions are raised in this case as were raised in No. 2085, The Chicago, Rock Island and Pacific Railway Company *vs.* The Territory of Oklahoma, which was dismissed this term of court for the reason that the change from a territorial form of government to statehood so changed conditions that the questions involved, while they may have been vital enough at the time the cases were appealed to the Supreme Court of the territory, are now merely abstract, hypothetical questions, from the determination of which no practical relief can follow.

41 The Act of Congress providing, "that said railroad company shall not charge the inhabitants of said Territory a greater rate of freight that the rate authorized by the laws of the State of Kansas?" also provides that, "Congress hereby reserves the right to regulate the charges for freight and passengers on said railway * * * until a State government or governments shall exist in said Territory within the limits of which said railway, or a part thereof, shall be located; and then such State government, or governments, shall be authorized to fix and regulate the cost of transportation of persons and freights within their respective limits by said railway." The state government now has full power to regulate the charges for intra-state freight and passenger traffic on said railway, and we believe this case falls within the rule laid down in case No. 2085, *supra*, and on the authority thereof should be dismissed. It is so ordered.

All the Justices concur.

UNITED STATES OF AMERICA,
State of Oklahoma:

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the above and foregoing is a true and correct copy of the opinion in the above styled and named cause, as the same remains on file and of record in my office.

In witness whereof, I hereto set my hand and affix the seal of the Supreme Court, at Guthrie, this 16th day of October, 1908.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court,
By W. M. BONNER, *Deputy.*

42 UNITED STATES OF AMERICA,
State of Oklahoma, ss:

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 41 pages, numbered from one to 41, inclusive, are a full, true and complete copy of all proceedings in the Supreme Court in the case of The Chicago, Rock Island & Pacific Railway Company, Plaintiff in error, *vs.* Territory of Oklahoma, Defendant in error, as the same remain on file and of record in my office.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court, at Guthrie, this 16th day of October, 1908.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court,
By W. M. BONNER, *Deputy.*

Endorsed on cover: File No. 21,404. Oklahoma supreme court. Term No. 608. The State of Oklahoma on the relation of Charles West, attorney general, as successor to the Territory of Oklahoma, plaintiff in error, *vs.* The Chicago, Rock Island & Pacific Railway Company. Filed November 7th, 1908. File No. 21,404.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 608.

THE STATE OF OKLAHOMA ON THE RELATION OF CHARLES WEST, ATTORNEY GENERAL, AS SUCCESSOR TO THE TERRITORY OF OKLAHOMA, PLAINTIFF IN ERROR,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, DEFENDANT IN ERROR.

MOTION TO ADVANCE.

And now comes the State of Oklahoma, by E. G. Spilman, Assistant Attorney General, and moves the court to advance the above-entitled case for hearing at an early date convenient to the court.

On the 5th day of October, 1908, writ of error was allowed in this case by the Supreme Court of the State of Oklahoma, and it involves the construction of section 4, chapter 319, 24 U. S. Statutes at Large, being an act approved March 2, 1887, entitled "Act to grant the right of way through the Indian Territory to the Chicago, Kansas and Nebraska railway and for other purposes," to wit, an inhibition against the said railway company and its successors, the defendant

in error, from charging the inhabitants of the Territory of Oklahoma a greater rate of freight than the rate authorized by the laws of the State of Kansas for services or transportation of the same kind.

This case is number 608 on the calendar of this court, and should be advanced because it involves a matter of general public interest to the State of Oklahoma, and will form the basis upon which rates in the State must be made. No rate case should be heard by the Corporation Commission of the State without taking into consideration this law as a measure of reasonableness if it is a valid law in force and effect.

Your petitioner, therefore, prays that this honorable court will advance said case and set it down for an early hearing.

E. G. SPILMAN,

Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 608.

THE STATE OF OKLAHOMA *on the Relation of* CHARLES WEST, *Attorney General, as Successor to the Territory of Oklahoma, Plaintiff in Error,*

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, *Defendant in Error.*

Please take notice that I will submit the annexed motion to this court on the 25th day of January, 1909, at the opening of court on that day.

Dated WASHINGTON, D. C., *January* 6, 1909.

Yours, etc.,

E. G. SPILMAN,
Attorney for Plaintiff in Error.

BRIEF FOR PLAINTIFF IN ERROR.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

Office Supreme Court, U. S.
FILED.
MAR 13 1911
JAMES H. McKENNEY,
CLERK.

No. 96.

THE STATE OF OKLAHOMA ON THE RELATION OF CHAS. WEST, ATTORNEY GENERAL, AS SUCCESSOR TO THE TERRITORY OF OKLAHOMA, PLAINTIFF IN ERROR,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

CHARLES WEST,
Attorney General.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 96.

THE STATE OF OKLAHOMA ON THE RELATION OF CHAS. WEST, ATTORNEY GENERAL, AS SUCCESSOR TO THE TERRITORY OF OKLAHOMA, PLAINTIFF IN ERROR,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, DEFENDANT IN ERROR.

BRIEF.

I. Statement.

On the 10th day of October, 1906, in the District Court of Oklahoma Territory for the County of Garfield therein, an action was filed in the name of the Territory of Oklahoma, Plaintiff, *vs.* Chicago, Rock Island & Pacific Railway Company, Defendant, by the filing of a petition.

Original Petition.

The petition alleged that the defendant was a railroad corporation and was operating a line of railroad through the county of Garfield and other portions of the Territory of Oklahoma. That by Act of Congress contained in Vol. 26 of the U. S. Stat., page 181, the defendant, Chicago, Rock Island & Pacific Railway Company was granted and undertook all the burdens and rights granted to and imposed upon the Chicago, Kansas and Nebraska Railway Company, a corporation heretofore organized and incorporated. That said last named corporation, Chicago, Kansas & Nebraska Railway Company was granted right of way through the Territory of Oklahoma upon certain conditions; that all of these rights and conditions were transferred to the defendant; that among said conditions by said act of Congress it was enacted that said defendant should not charge the inhabitants of said Territory a greater rate of freight than the rate authorized by the laws of the State of Kansas for services or transportation of the same kind. That by the laws of the State of Kansas the rate for the transportation of freight, to-wit, wheat, in said State is:

For 25 miles 6 cents per hundred pounds.
For 30 miles 6½ cents per hundred pounds.
For 35 miles 7 cents per hundred pounds.
For 45 miles 7½ cents per hundred pounds.
For 50 miles 8 cents per hundred pounds.
For 55 miles 8 cents per hundred pounds.
For 75 miles 8½ cents per hundred pounds.
For 85 miles 9½ cents per hundred pounds.
For 95 miles 10 cents per hundred pounds.
For 105 miles 10½ cents per hundred pounds.
For 115 miles 11 cents per hundred pounds.
For 125 miles 11½ cents per hundred pounds.

For 135 miles 12½ cents per hundred pounds.
For 150 miles 14 cents per hundred pounds.
For 200 miles 15¼ cents per hundred pounds.

That said defendant in violation of said conditions under which it now occupies its right-of-way, and in violation of said acts of Congress, and in violation of law, and in violation of the right of plaintiff and the inhabitants of said Territory of Oklahoma and the shippers of wheat therein, now charges for transportation of wheat according to its local distance tariff:

For 25 miles 7 cents per hundred pounds.
For 30 miles 7½ cents per hundred pounds.
For 35 miles 8 cents per hundred pounds.
For 45 miles 8½ cents per hundred pounds.
For 50 miles 9 cents per hundred pounds.
For 55 miles 9 cents per hundred pounds.
For 75 miles 9½ cents per hundred pounds.
For 75 miles 9½ cents per hundred pounds.
For 85 miles 10½ cents per hundred pounds.
For 95 miles 11 cents per hundred pounds.
For 105 miles 11½ cents per hundred pounds.
For 115 miles 12 cents per hundred pounds.
For 125 miles 12½ cents per hundred pounds.
For 135 miles 13½ cents per hundred pounds.
For 150 miles 14½ cents per hundred pounds.
For 200 miles 15½ cents per hundred pounds.

That the demand, collection and receiving by defendant of said charges last enumerated, in so far as they are larger than those authorized by the laws of the State of Kansas for the shipping of wheat, is an unlawful act and omission which renders other persons, to-wit: the inhabitants of said Territory of Oklahoma and the shippers therein of the Territory of Oklahoma insecure in the use of

their property, to-wit: the public right to ship wheat over defendant's line at a rate not exceeding that authorized by the laws of the State of Kansas as aforesaid, and the maintenance of said demand, collection and receipt of said overcharge by said defendant is a public and a common nuisance.

That the defendant is a common carrier of freight in said Territory and in said County of Garfield, and the maintenance of said common nuisance is an irremediable injury to the plaintiff against which it has no adequate remedy at law; that said offense continues daily and is daily committed by defendant and defendant threatens to continue the same indefinitely.

That said charging, collecting and receiving by said defendant of said rate of tariff in addition to said rates authorized by the laws of the State of Kansas, grossly injure the persons and property of the inhabitants of the Territory of Oklahoma and of this plaintiff, and by reason of the multiplicity of said acts plaintiff has no remedy according to the course of the common law.

And there was a prayer for injunction against the charging, collecting or receiving, directly or indirectly, a greater amount than that authorized by the laws of the State of Kansas as set out in the petition.

On the 16th day of October, 1906, the defendant therein, Defendant in Error herein, filed his answer as follows:

Answer in the Trial Court.

1. A general denial.

2. "Said defendant further answering says that the said court has no jurisdiction of the subject matter of said action, said jurisdiction being vested exclusively in the Interstate Commerce Commission of the United States and the Supreme Court of the United States.

3. "Said Defendant further answering states that

the Attorney General of said Territory has no jurisdiction or authority to commence, maintain or prosecute said action for the reason that under the Acts of Congress relating to the subject matter of the said action jurisdiction and authority to commence, maintain and control the said action is vested exclusively in the Interstate Commerce Commission of the United States and the Attorney General of the United States."

To this on the 27th of October, 1906, a general denial was filed by way of reply.

On the 19th day of October, 1906, there was heard an application on behalf of the plaintiff for a temporary order of injunction. Both parties offered evidence and rested, and the court found for the plaintiff and against the defendant, and that the allegations of the petition and its application were true, and that the plaintiff should have a temporary writ of injunction as prayed in the petition; and thereupon the court enjoined the defendant in error from demanding, collecting or receiving more than the amount stated by the petition to be authorized by the laws of the State of Kansas.

From the order allowing a temporary writ of injunction an appeal was taken to the Supreme Court of the Territory of Oklahoma, and being undisposed of at the event of statehood, passed to the Supreme Court of the State of Oklahoma.

On the 22d of June, 1908, the Supreme Court of the State of Oklahoma in passing upon said case held that the case presented nothing but an abstract and hypothetical case and dismissed the cause.

This cause was tried together with a cause of the same name both in the trial court, and in the Supreme Court, under the number of 2085. In the Supreme Court of the State of Oklahoma and in the trial of this case the court adopted its judgment in No. 2085. By agreement the two

cases were tried together. A petition for rehearing that went to both cases was filed. That petition was overruled on the 8th day of September, 1908, affirming the former judgment of the Supreme Court of the State of Oklahoma, and from this order and judgment a writ of error was allowed on the 5th day of October, 1908, to this court.

II. Assignments of Error.

The assignments of error set out that the Plaintiff in Error has been deprived of its substantial rights and a grievous injury and wrong done it in this that the Supreme Court of the State of Oklahoma erred:

1. In holding that the plaintiff in error had not established a right to the injunctional relief prayed for.

2. That an Act of Congress approved March 2, 1907, entitled: "An Act granting right of way through the Indian Territory," 24 U. S. Stat. 446, 447, and an Act of Congress approved June 29, 1890, entitled "An Act granting to the Chicago, Kansas & Nebraska Railway power to sell," 26 U. S. Stat. page 181, and an Act of Congress approved June 16, 1906, entitled "An Act to enable the people of Oklahoma and Indian Territory to form a Constitution," Statutes of the United States, 1905-6, Part 1, page 267, and other Acts of Congress amendatory, supplementary and auxiliary thereto, have each and all of them become merely abstract and hypothetical questions.

3. That the Supreme Court of the State of Oklahoma erred in holding that said statutes did not have at the time of their decision any vital force and bearing upon the issues therein.

4. That said Supreme Court erred in holding that said action should be dismissed.

5. That said Supreme Court erred in applying to the decision of the issues therein its erroneous conclusions

reached in cause No. 2085 of the same name and parties, decided at the same time in this, to-wit, in holding:

(*a*) That all rights saved the Territory of Oklahoma and its inhabitants by common law and said Statutes of the United States have been superseded by the Constitution and laws of the State of Oklahoma. And

(*b*) That in said actions the intrastate rates alone were sought to be controlled, and refusing to apply said statutes a least to the interstate rates. And

(*c*) In holding that while the said action was pending before the Supreme Court of the Territory of Oklahoma that said Territory of Oklahoma became a state, and that the establishment of the Territory of Oklahoma and the Indian Territory into a state had so changed conditions that the settlement of the questions of whether the interstate and intrastate rates complained of should be enjoined could serve no useful purpose. And

(*d*) In holding that the admission of the Territory of Oklahoma and the Indian Territory to statehood so changed the relations of the people to the common carriers doing business therein that the cause ought to be dismissed, and also in holding that the relation of the common carrier doing business in the state was so dissimilar from the relation of the same carrier doing business in the territories out of which said state was formed that the statutes controlling the actions of said carriers were inapplicable to the actions of said carriers after the said territories became a state.

6. That said Supreme Court erred in reversing the judgment of the trial court and in dissolving the injunction and in dismissing the case.

The dismissal of the case is a final judgment or decree in a suit of the highest court of the State. And it also appears that there is directly and necessarily drawn in question the construction of a statute of the United States, and the decision is against the rights especially set up or claimed

under such statutes in this, that it was claimed in said action that the Act of the 24th Statutes at Large, page 447, as to the defendant, that "Said railroad company shall not charge the inhabitants of said Territory a greater rate of freight than the rate authorized by the laws of the State of Kansas for service or transportation of the same kind" was a protection to the people of said Territory and a limitation on the charges of said railroads, and that said Supreme Court held that in view of the fact that the Corporation Commission of the State of Oklahoma had authority to regulate the charges of carriers in the State that the right given by said statutes had become ineffective.

The Plaintiff in Error claims this is erroneous, in general, for the reason that said statute is a limitation on the charges of both intrastate and interstate rates, and that the Corporation Commission of the State of Oklahoma has no authority whatsoever over interstate rates, and again, that though the Corporation Commission of the State of Oklahoma and the Interstate Commerce Commission of the United States have authority to determine

First, the reasonable interstate, and second, the reasonable intrastate rates and fix the same, yet they have no authority to enforce the laws generally, and that as the rates in this case complained of were in violation of a statute under which the Defendant in Error operated its railroad over its right-of-way, that the power of said Commissions to fix reasonable rates in no way interfered with the power of the court to enjoin an illegal rate. That when the petition for rehearing was filed, again calling the attention of the court to the same questions, that by refusing to grant said petition and affirming the former judgment that the same errors were recommitted as committed originally.

III. Points of Law.

A. *The Issues and How Determined.*

The judgment of the trial court having been that the allegations of the petition were true, and granting an injunction, the Supreme Court of the State of Oklahoma dismissed the action on the ground that the statutes under which they were brought no longer afforded a remedy. Therefore, all the allegations of the original petition were taken as true and it is assumed that it is conclusively established in the case that the Defendant in Error did charge the inhabitants of said Territory a greater rate of freight than the rate authorized by the laws of the State of Kansas for services or transportation of the same kind.

In order to understand the situation thoroughly it will be necessary to examine the opinion of the Supreme Court of Oklahoma in case No. 2085 pending therein for the reason that No. 2086 by reference to No. 2085 says that practically the same conclusions are reached in No. 2086 as in No. 2085. We, therefore, set out so much of 2085 as bears upon the Federal question involved in this appeal.

> "The Supreme Court will not decide abstract or hypothetical cases disconnected from the granting of actual relief, or from the determination of which no practical relief can follow."

(Syllabus by the court.)

Error from the District Court of Garfield County; before M. C. Garber, trial judge. DISMISSED.

Opinion of the Court by Kane, J.:

> "This suit was commenced on the 9th day of August, 1906, in the District Court of Garfield County, Oklahoma Territory, by the Attorney General in the name of the Territory of Oklahoma, by filing a

petition therein, which alleged, in substance, that the Chicago, Rock Island & Pacific Railway Company is a corporation, incorporated in one of the States or Territories of the United States, which one is unknown to plaintiff, and operating a line of railroad in the County of Garfield and other portions of the Territory. That it had, in connection with other railways of the Territory adopted a tariff, prescribing certain rates on corn and wheat, and that in addition thereto recently adopted an addition of five cents per hundred on wheat and four cents per hundred on corn on shipments of that commodity to the stations of Sayre, Next Ranch and Erick, three cents per hundred on wheat and two cents per hundred on corn to the stations of Temple and Hastings, and four cents per hundred weight on wheat and three cents per hundred weight on corn for shipments to Texola, known as an arbitrary. That such arbitrary charges were unlawful, and that they were unreasonable and unjust. That the public and inhabitants of Oklahoma were entitled to rates that were reasonable and just, and that the maintenance of said demand, was a public and common nuisance. That the charging and receiving of such arbitrary rates grossly injured the person and property of the inhabitants of the Territory of Oklahoma and by reason of the multiplicity of said acts plaintiff had no adequate remedy according to the course of the common law, and prayed that the defendant be enjoined from demanding and collecting said arbitrary charge."

To this petition the defendant filed its answer denying each and every allegation therein contained and pleading that the court had no jurisdiction of the subject matter, such jurisdiction being vested exclusively in the Interstate Commerce Commission of the United States and Circuit Court of the United States, and alleging that the Attorney General of said Territory had no jurisdiction and authority to commence, maintain and prosecute said action for the reason that under the Acts of Congress relating to the sub-

ject matter of said action, the jurisdiction and authority to commence, maintain and control the said action is vested exclusively in the Interstate Commerce Commission of the United States and the Attorney General of the United States.

On the 19th day of October, 1906, the cause came on to be heard on the application of the plaintiff for a temporary writ of injunction and upon said day the court granted said writ and made an order in words and figures as follows, to-wit:

> "Now on this October 19th, 1906, the plaintiff being present by W. O. Cromwell, Attorney General, and Charles West, its special attorney, and the plaintiff by C. O. Blake, its attorney, the application of the plaintiff for a temporary order of injunction comes on to be heard and after the introduction of evidence by each side, both sides rest, and the Court finds for the plaintiff against the defendant, that the allegations of the petition and its application are true, and that a temporary order of injunction ought to be granted herein.
>
> "It is therefore considered, ordered and adjudged that the defendant, the Chicago, Rock Island & Pacific railway be forever restrained and enjoined from demanding or collecting or receiving for the transportation of freight or wheat shipped in carload lots to Sayre, Next Ranch, Erick and Texola, 5 cents per hundred weight in addition to the local distance tariff, and on corn two cents per hundred weight when shipped to Temple or Hastings, and four cents per hundred weight on wheat when shipped to Waurika and four cents per hundred weight on corn to Sayre, Next Ranch, Erick and Texola, and three cents per hundred weight on corn shipped to Temple and Hastings, in addition to the local distance tariff charge to said stations now in force and effect until the final hearing of this cause, and until further order of the court, without bond—to all of which the defendant at the time excepted, and said defendants asks, and for good cause shown, was by the court

making the order granted sixty days in which to make and serve a case made for appeal to the Supreme Court, and the plaintiff was granted fifteen days in which to suggest amendments thereto, the same to be settled upon five days' notice in writing by either party.

"That the order shall not take effect until the expiration of the time allowed to make and settle said case, and seventeen days additional time to file said appeal."

"From the above order of the court the defendant appealed to the Supreme Court of the Territory of Oklahoma, and the cause was transferred to the Supreme Court of the State under the terms of the Enabling Act and schedule to the Constitution."

At this point after stating the record clearly the court proceeds to overlook the real point at issue in the case, although the same clearly appears from the briefs.

There were two questions raised by the defendant in this case as in No. 2085. First, that the court did not have jurisdiction on the ground that the jurisdiction was vested exclusively in the Interstate Commerce Commission of the United States; and, second, on the ground that the Attorney General of the Territory did not have authority to begin the action for the reason that the entire authority to maintain the action was vested exclusively in the Attorney General of the United States.

In the brief filed by the Plaintiff in Error in the Supreme Court of Oklahoma (the Defendant in Error here), the question was presented of the jurisdiction of the District Court, in view of the particular jurisdiction which the Interstate Commerce Commission is vested with; and, second, the authority of the Attorney General to bring the action. It was contended that there was no common law in the generally accepted sense of the Territory of Oklahoma.

In answer to this contention the Attorney General for the Territory of Oklahoma in his brief addresses himself

first to the proposition of whether there was common law in the Territory of Oklahoma, and on page 3 of his brief he asks the court to enforce the common law rule; but that was a common law rule as to the right of the Attorney General to maintain an action.

Although the petition in the lower court in case No. 2085 did not in so many words plead the Federal Statutes, it did say that the charges made were arbitrary and unreasonable, unlawful and unjust. If either the Acts of Congress or the acts of the Territory of Oklahoma, whose legislature only acted by virtue of the authority given them from the Congress of the United States—in either event, if either set of laws were violated the act done would be illegal and the allegation that the charges were arbitrary, illegal and unlawful are sufficient to let in proof that they were illegal according to the laws of either Congress or of the Territory of Oklahoma.

On page 8 of the brief of the Attorney General of the Territory of Oklahoma it is stated specifically that the right granted by the Acts of Congress is in each inhabitant, and its infringement is an injury not only to the individual but to the public. On page 12 of said brief attention is called to the fact that the District Courts of said Territory are vested with all the power of the Circuit or District Courts of the United States, and are authorized to enforce all laws of the Territory. In addition thereto they have jurisdiction in all cases arising under the laws of the United States not expressly nor by necessary implication limited to some other court of the United States. Its jurisdiction is presumed until the contrary is conclusively shown. All this was in answer to the contention of the Plaintiff in Error, who, in his brief, on pages 8 to 23, had argued against the jurisdiction of the District Court. There was no direct contention on the part of the Plaintiff in Error that the Federal Acts limiting the charges of the carrier were not applicable to

their performance, but the contention was that the district court of the Territory did not have jurisdiction to hear such an action because the conclusive jurisdiction was vested in the Interstate Commerce Commission and the Attorney General of the Territory of Oklahoma did not have the right to bring an action because that exclusive power was vested in the Attorney General of the United States.

No additional statement was needed than that of the Attorney General of the Territory on page 8 of his brief in which he says, that the right that he seeks to enforce is that right created by the Act of Congress. This was clearly understood by both the parties to the case, and after statehood the Attorney General of the State filed his brief in action No. 2086, but by agreement it was to apply to both No. 2086 and No. 2085. At the bottom of his memorandum brief he says "the questions involved in this case are identical with the questions involved in case No. 2085, and it is desired by the Attorney General that this brief be used in connection with said case of 2085," and then occurs a discussion in detail of the Acts of Congress applicable to the case, and of the jurisdiction of the Interstate Commerce Commission, and of the right of the Attorney General to maintain the action. So that when the case went to the Supreme Court of the State of Oklahoma for decision it was clearly apparent that the parties rested upon the same Federal Acts in both No. 2085 and No. 2086; but the Supreme Court of the State apparently overlooking the plain meaning of the briefs on this point, takes for granted that the point at issue is only the common law right of the Attorney General to bring an action, and says:

> "It appears from the petition and brief of appellee that it seeks to restrain by injunction interference with certain common law rights to which, it contends, the people of the Territory of Oklahoma were entitled. The following is a statement of the theory of the case, taken from the brief of counsel: 'Appellee

asks the court to enforce in this action the following common law rule, which is well established: "At common law, a public or common carrier is bound to accept and carry for all, upon being paid a reasonable compensation. The common law condemns unjust and unreasonable charges, and it has always been the right of a shipper, at common law, to receive back any overcharge or excess beyond a reasonable compensation.'

"In support of this doctrine, *Beadle vs. K. C. etc. Ry. Co.*, 32 Pac., 910, is cited.

"The appellant insists that at the time the action was commenced there was no common law in its accepted sense within the Territory of Oklahoma, and further argues:

"First, that the court below had no jurisdiction of the subject matter in this action.

"Second, the Territory of Oklahoma had no authority to sue in said action or maintain said action.

"Third, the Attorney General had no authority to maintain said action, and,

"Fourth, the petition did not state facts sufficient to constitute a cause of action.

"Both parties brief their respective sides of the controversy learnedly and exhaustively. But to our mind conditions have so changed since the commencement of this suit that it is unnecessary for the court to pass upon the numerous intricate questions of law argued by counsel.

"Whatever may have been the powers of the Territory of Oklahoma to protect the common law rights of its inhabitants against common carriers by the writ of injunction at the time this suit was commenced, such common law rights, in so far as they may have related to fixing the rate for carrying passengers or freight by public or common carriers, have been superseded by the Constitution and laws of the State of Oklahoma.

"Section 18, Article 9, of the Constitution, provides, that:

"'The Commission (meaning the Corporation Commission), shall have the power and authority and be charged with the duty of supervising, regu-

lating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications, of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements, the Commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or, acted upon by any such company, inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void.'

"While it is not clear from the record or the briefs of counsel whether the rate complained of had reference to intrastate or interstate shipments, yet it is reasonably apparent that intrastate rates alone are sought to be controlled. Taking this view of it, it will be seen by the above quotation from the Constitution of the State of Oklahoma, that until, changed by the legislature, the question of fixing intrastate rates is now entirely with the Corporation Commission, subject to appeal from its decisions to the Supreme Court of the State. This being so, and the further fact that since this suit was filed in the Supreme Court of the Territory of Oklahoma, the Territory of Oklahoma and Indian Territory, have been erected into a State as the State of Oklahoma, has so changed conditions that the settlement of the other questions raised could serve no useful purpose; nothing, so far as the record discloses, would be settled by a decision of this court, except, who shall pay the costs. It has been held by this court in the following cases: *Freeman vs. Board of Med. Examiners,* 95 Pac., 229; *Burkhalter vs. Smith,* 95 Pac., 241;

Harman vs. Burt, 94 Pac., 528, and *Parker, et al. vs. Ter.*, 94 Pac., 175, that:

"'The Supreme Court will not decide abstract or hypothetical cases disconnected from the granting of actual relief, or from the determination of which no practical relief can follow.'

"We believe this case falls within the rule above laid down. Under the present order of things the necessity of invoking the common law rule for the regulation of rates does not exist. And the relations existing between the State and the common carriers doing business therein at this time and the relations that existed between the Territory of Oklahoma and the common carriers therein are so similar that, the language of Pearson, C. J., in a case similar in principle, *Kidd vs. Morrison, et al.*, 62 N. Car., 38, applies with great force to the case.

"'There being no longer any subject matter of controversy, the question arises whether the court will hear the cause, and make a decree that can only serve to dispose of the costs?

"'To say nothing of the labor and consumption of time in wading through a mass of depositions, and weighing the learned arguments which the hearing would elicit, the court does not consider itself at liberty to go into a hearing, for the reason that there is nothing now before it but a mere hypothetical case, and any declaration of principle set out in the decree would be entitled to, and would receive, no more consideration than mere *dicta*.'

"We are, therefore, of the opinion that this cause ought to be dismissed. It is so ordered. All the Justices concur."

Now in the opinion in 2086, the court, after stating the case, says that practically the same questions are involved in both cases; that because of the changed conditions, that because the State government has now full power to regulate the charges for interstate freight and passenger traffic, that it believes No. 2086 falls within the rule of 2085 and therefore dismisses the case.

In No. 2086 the Plaintiff in Error in the Supreme Court of the State of Oklahoma, in addition to the points set out in his brief in No. 2085, discusses in detail the Acts of Congress involved. And for the reason that the brief of the Plaintiff in Error in that court had called attention to the Acts of Congress specifically the brief of the Attorney General of the Territory of Oklahoma likewise mentioned and discussed those specific statutes, so that the statutes upon which this case rests were fairly presented to the court. After the decision a petition for rehearing was filed in said court in both cases. The petition for rehearing specifically set out that the case, resting as it did upon the petition, answer and reply, and there being no pleadings alleging that the court could not construe the whole, that though the Corporation Commission of Oklahoma had the power to regulate rates involved that they had not done so; that the pleadings not having been changed the case must be decided upon the facts stated in the original pleadings.

And, secondly, attention was called to the Federal statutes, and that they underlaid both cases, and that the memorandum brief filed by the Attorney General of the State "was to be used in connection with both cases, No. 2085 and No. 2086." The said brief clearly showed that the State rests its right in both cases not upon his common law right but upon the provisions of a Federal statute, by it cited, Sec. 4, Chap. 319, 24 Statutes at Large, page 447, and quoted by this court in its opinion in case No. 2086. That the common law right and the only common law right mentioned by the Attorney General of Oklahoma in his brief, which is referred to by this court, is the common law right of the Attorney General to bring an injunction to prevent a corporation from exceding its corporate rights.

And, thirdly, that the opinion of the Supreme Court of Oklahoma in No. 2086, stated (in No. 2085), "While it is not clear from the record or briefs of counsel whether the rate complained of had reference to intrastate or interstate

rates, yet it is reasonably apparent that intrastate rates alone were sought to be controlled," was without any basis and ignored the right of the state in that "The Federal statute upon which the action was based limited all the charges of the carrier, both those intrastate and interstate," the prayer being that the carrier shall not be allowed to charge in excess of the limit fixed by Federal statute. In a fourth ground in said petition for rehearing it was set out that it was erroneous to dismiss said action because of the jurisdiction vested in the Corporation Commission of the State of Oklahoma because "The Corporation Commission of the State of Oklahoma, being authorized to deal only with intrastate rates, and having no power over interstate rates, the failure of the court to apply the Federal statute on the ground that application may be made to the Corporation Commission of the State of Oklahoma fails to give any relief as to the interstate rates exceeding the statute, because as to these the Corporation Commission of the State clearly had no jurisdiction."

> "6. In a fifth ground objection was had to the error of applying the following statement to the solution of the case, 'that until changed by the legislature the question of fixing intrastate rates is now entirely with the Corporation Commission, subject to appeal to the Supreme Court of this State.' It was said in answer to this in that petition for rehearing, 'This power we do not deny, but say it is not a question of fixing a rate, but a question of prohibiting railroads from voluntarily, without authority of law, charging a rate greater than that contained in its limitations. If the rates charged by the railroad had been fixed by authority of law that would have been a proper defense.' In that petition for rehearing it was said, on page 8 thereof:
>
> "Not only did the Federal Statute now grant a franchise upon condition, which condition being broken allowed a forfeiture by the Federal Government or an injunction by any person hurt, and, therefore, by the State generally, but, further, the statute expressly

> reserved to Congress the right to fix a rate on all kinds of traffic, both State and interstate, until statehood. When statehood supervened, the right to fix the rate on State traffic inured to the State, and this statute, therefore, clearly shows the difference between the limit put upon a voluntarily act of the railroad, and the right to fix the rate lodged in Congress for territorial and interstate traffic and in the State for State traffic."
>
> "7. The sixth objection was:
>
> "It must not be argued that because the Corporation Commission has the right to fix what shall be the reasonable rate, that, therefore, no right exists to forfeit a charter for violation of statute, or enjoin an act by a corporation, because of an excess of right given by a statute."

These points being presented were ignored by the court. From them it clearly appears that the court necessarily passed on the Federal questions.

The court did not hold that the petition did not state facts sufficient; the court expressly refused to pass upon the question of whether the Attorney General of the Territory had a right to bring an action, and the Attorney General of the State the right to maintain it, and also squarely refused to declare a right asserted under a Federal law on the ground that:

> "Since this suit was filed in the Territory of Oklahoma the Territory of Oklahoma and the Indian Territory have been erected into a State as the State of Oklahoma, has so changed conditions that the settlement of the other questions raised could serve no useful purpose. Nothing as far as the record discloses would be settled by a decision of this court except who pays the costs."

After setting out the statute involved, the Supreme Court said:

> "The State government has now full power to regulate the charges for interstate freight and pas-

> senger traffic on said railway, and we believe this case falls within the rule laid down in No. 2085, *supra*, and on the authority thereof should be dismissed."

That is that whatever force there may once have been in the Federal statutes:

> "That the change from a territorial form of government to statehood so change conditions that the questions involved, while they might be vital enough at the time the case was appealed to the Supreme Court of the Territory are now merely abstract."

The decision of the Supreme Court of the State admits, as it were, that the injunction was rightfully granted in the lower court, but something should be said under this head.

B. *Injunction Properly Allowed in the Lower Court.*

As to the Chicago, Kansas & Nebraska Railway Company it is provided in Section 4, Chapter 319, 24 U. S. Stat., page 447, being an Act approved March 2, 1887, entitled "An Act to grant right of way through the Indian Territory to the Chicago, Kansas & Nebraska Railway and for other purposes:"

> "SEC. 4. That said railroad company shall not charge the inhabitants of said Territory a greater rate of freight than the rate authorized by the laws of the State of Kansas for services or transportation of the same kind: Provided, That passenger rates on said railway shall not exceed three cents per mile. Congress hereby reserves the right to regulate the charges for freight and passengers on said railway and messages on said telegraph and telephone lines, until a State government shall exist in said Territory within the limits of which said railway or a part thereof, shall be located; and then such State government or governments shall be authorized to fix and regulate the cost of transportation of persons and freights

> within their respective limits by said railway; but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railway or said company whenever such transportation shall extend from one State into another, or shall extend into more than one State; Provided, however, that the rate of such transportation of passengers, local or interstate, shall not exceed the rate above expressed: And provided, further, That said railway company shall carry the mail at such prices as Congress may by law provide; and until such rate is fixed by law the Postmaster General may fix the rate of compensation."

And by an Act approved June 29, 1890, entitled "An Act granting to the Chicago, Kansas & Nebraska Railway Company power to sell and convey to the Chicago, Rock Island & Pacific Railway Company," 26 U. S. Stat., page 181, it was provided:

> "That the Chicago, Kansas & Nebraska Railway Company and is hereby authorized and empowered to sell and convey to the Chicago, Rock Island & Pacific Railway Company, a corporation organized and existing under the laws of the States of Illinois and Iowa, all the railway, property, rights and franchises of said The Chicago, Kansas & Nebraska Railway Company in the Territory of Oklahoma and in the Indian Territory, including all the rights, privileges and franchises granted to said The Chicago, Kansas & Nebraska Railway Company by the Act of Congress entitled "An Act to grant the right of way through the Indian Territory to The Chicago, Kansas & Nebraska Railway, and for other purposes," approved March 2d, 1887, subject to all the conditions, limitation and requirements of said Act, and said The Chicago, Rock Island & Pacific Railway Company is hereby authorized and empowered, subject as aforesaid, to purchase, hold, maintain and operate the railway heretofore constructed by The Chicago, Kansas & Nebraska Railway Company, under the said Act of Congress, and to complete the construction of all lines of railway, mentioned in said Act of Con-

> gress not heretofore constructed by said The Chicago, Kansas & Nebraska Railway Company: Provided, however, That, before any such sale and conveyance shall be made, the terms thereof shall be approved by a majority of the directors of said The Chicago, Kansas & Nebraska Railway Company."

A better understanding of these statutes is had when the history of like statutes is considered.

(1) History of Similar Legislation.

First, in the year 1865, 12 U. S. Stat., p. 774, is a provision to the following effect: That the price for carrying the United States mail over the lines therein granted right of way, and also therein given a grant of land, should be fixed by Congress, and until so fixed, should be fixed by the Postmaster General. Following this, in the statutes of the Thirty-eighth Congress, 13 U. S. Stat., page 314, is a provision that the railroad therein granted right of way should be a public highway, and should transfer government troops free. For a long time the legislation of Congress shows no attempt to either specifically fix the rates or fix the maximum charges. But on the 2d of August, 1882, in the grant of right of way to the Frisco Railroad, to build through a portion of the then Indian Territory, will be found the first attempt by Congress to directly fix the maximum rate. It is in 22 U. S. Stat., pages 182 and 183. That portion pertinent here is as follows:

> "SECTION 7. That no greater rate of fare or freight shall be charged in the Choctaw or Chickasaw nations by such railroad company than the lowest rate authorized by law in the States of Arkansas and Texas, or either of them, for services or business of the same kind."

An understanding of this legislation is best arrived at from a description in American Railroad Rates, by Judge

Walter C. Noyes, at page 214. In speaking of the American Railroad rates he says:

> "In our examination of underlying principles we saw that the States in granting early railroad charters * * * following the old canal acts * * * even prescribed tolls to be collected for the use of the roads, as well as charges for transportation services. While this distinction was not long observed, and the rate was treated as governing both the toll and the charges * * * nearly all charters contain some provision concerning rates. Generally maximum rates were prescribed leaving to the railroads the right to fix the exact rates within the State limitations."

And on page 216 he says:

> "Many of the statutes relating to railroad charters and especially those providing for Commissions with mandatory power over rates, were a result of the (Granger) movement which took place in the Middle West between 1870 and 1877."

The first Act of Congress of this kind, that contained in Section 7 of the 22d U. S. Stat., page 182—the grant of right of way to the Frisco—is, therefore, simply an echo of the Granger movement, the validity of which legislation had recently been upheld in the case of *Munn vs. Illinois*, 94 U. S., 113, and the other maximum rate cases of about that time. The States had attempted to prescribe a maximum beyond which the railroads should not fix rates. In the Munn case the State of Illinois had attempted to fix a maximum beyond which the legislature should not make a charge; and in that case the question was "the power of the State of Illinois to fix a maximum rate chargeable for the storing and elevating of grain in the City of Chicago," and the court, after upholding the statute upon the ground that at common law a person in a public employment could only charge a reasonable sum for his services, says:

> "In countries where the common law prevails it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or perhaps, more properly speaking, to fix a maximum beyond which any charge made would be unreasonable."

It is our contention that the statute contained in the 26 U. S. Stat., page 181, like the grant of right of way to the Frisco, 22 U. S. Statutes, page 182, and exactly like the statute passed on by the court in the Munn case, was one which, to use the language of the court in that case, *"Perhaps, more properly speaking fixed the maximum beyond which any charge made would be unreasonable."*

The reason for the statute becomes apparent when the other statutes, which are to be considered in *pari materia,* are considered. These statutes all deal with the same general subject matter, that of fixing a maximum charge and so should be considered together.

At pages 80 to 82, Section 4, 29 U. S. Stat., right of way was granted to the Frisco Railroad to build from Sapulpa to Sherman, Texas, and the words of limitation in that statute are, after granting right of way through both the Indian Territory and the Territory of Oklahoma:

> "Section 4. That said Railway Company shall not charge the inhabitants of said Territories a greater rate of freight than the rate authorized by the laws of the State of Kansas for services or transportation of the same kind."

Thus it will be seen that the Act of 29 U. S. Stat., pages 80 to 82, as to the Sherman branch of the Frisco specifically applied to the same limitations to the inhabitants of both the Indian Territory and the Territory of Oklahoma.

(2) Object of Limitations.

It will be found that every single railroad going into the Indian Territory or into Oklahoma Territory after it became a territory, where right of way over public lands was gotten from Congress, contained in its charter a specific provision limiting the freight and passenger charges to an amount not to exceed what was authorized to be charged in the State out of which the railroad was built. Where we find the settled habit of Congress was to put this limitation on, must we not infer that it was done because it was supposed that the Territory was without such a power itself, and therefore was left without protection? The Interstate Commerce Commission having been given authority over the transportation in a Territory, just as between the States, it was thought that a Territorial legislature had no authority in that matter and this legislation must, therefore, be looked at as intended to be a protection for the people of the Territory of Oklahoma.

The word "inhabitant" as used in this statute is evidently used in that sense recognized by the dictionary as an equivalent to a dweller in the place, whether he has political rights or not, that is any person who does business in the Territory who naturally would have rights growing out of transportation in the Territory. Because in the Act contained in 22 U. S. Stat., page 183, it is provided that "no greater rate shall be charged in the Choctaw and Chickasaw Nations" that is to anybody. The Act is not limited to inhabitants.

These Acts all covering the same matter are in *pari materia* and the wording used in one Act is to be considered in construing the wording of other similar acts.

(3) Remedy at Common Law.

Now as to how this right was to be protected, reference must be had to *McKennon vs. Winn*, 1 Okla., 327, holding that when the people from all parts of the United States on April 22, 1889, settled the country known as Oklahoma, they brought with them the established principles of the common law as recognized and promulgated by the American courts.

Section 4200, of Wilson's Ann. Stat. of Oklahoma, provides that:

> "The common law as modified by constitutional or statutory law, judicial decision, and the conditions and wants of the people, shall remain in force in aid of the general statutes of Oklahoma."

In *Tift vs. Southern Railroad*, 123 Fed., 789, which case was affirmed before the Supreme Court under the name of *Southern Railroad vs. Tift*, 206 U. S., 428, it was squarely held that injunction was a proper remedy to prevent an illegal charge.

To the same effect is *Central Iron Works vs. Pennsylvania County*, 117 Pa. Circuit Ct. Rep., 651; also in 5 Pa. Dist. Ct. Rep., 247, and

American Coal Co. vs. Consolidated Coal Co., et al., 46 Md., 15.

Rogers Works vs. Erie Railroad, 20 N. J. Eq., 379.

And McCoy vs. Cincinnati Co., 13 Fed., 3.

Georgetown vs. Alexander Canal, 12 Pet., 908.

(4) Remedy by Statute Declaratory of Common Law.

In *Attorney General vs. Railroad Company*, 35 Wis., 425, particularly at page 523 *et seq.* in an exhaustive opinion it was held that under the common law the Attorney General could sue out a writ of injunction to restrain a rail-

road from charging a greater rate than it was by law authorized to charge.

Wilson's Annotated Statutes 4440 provided that an injunction may be granted in the name of the Territory to enjoin and suppress the maintenance and keeping of a common nuisance, and that such an action can be brought by the Attorney General on information and belief. The petition alleges in effect a nuisance in that it says, "That it, by its demand and collection of more than a legal charge, renders the inhabitants of the said Territory of Oklahoma and the shippers therein insecure in the use of their property, that is the public right to ship wheat at a rate not exceeding that authorized by law."

That the Attorney General has the power of the Attorney General in England under the common law is the settled law of this court.

San Jacinto Tin Co. vs. U. S., 125 U. S., 278.

And in *St. Louis & San Francisco Railroad Company vs. Gill*, 156 U. S., 666, this court, speaking on such a subject says:

> "Sometimes in acting on this subject the State legislatures have created Commissions or Boards of Public Works with power to establish rates for the transportation of passengers and freight, and in such case the course recommended by Mr. Justice Miller, already cited, may well be followed: *That the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity of some equivalent proceeding wherein the rights of the public as well as those of the company complaining can be protected.*"

Now, who but the Attorney General can bring a bill in equity to remedy an unreasonable tariff?

(5) Abilene Cotton Case a Question of Reasonableness; This a Question of Legality.

This case is not disposed of by a consideration of *Texas Pacific Railway Company vs. Abilene Cotton Oil Company*, 204 U. S., 426, for the reason that in that case there was simply a consideration of what was a reasonable rate. The court held that this was to be determined—as to interstate traffic—first, by the Corporation Commission, and that it had exclusive jurisdiction, whereas, different courts might have a different measure of reasonableness. But the reasoning of that case is not applicable here because this is not a question of reasonableness but the Interstate Commerce Commission passed upon the very point in *Haines vs. Chicago, Rock Island & Pacific Railway Company*, decided March 9, 1908, 13 I. C. Rep., page 214, case No. 1113, in which the Commission said, in discussing its authority to give relief under precisely similar statutes, involving the same railroad company in the State of Oklahoma and used this language:

> "This commission is the creature of statute, and its authority is derived from the Act of Congress creating the commission and the various amendments. Its function is to administer the act to regulate commerce and not to enforce conditions found in Federal or other charters. While a violation of the conditions of the Acts of Congress granting right of way may be grounds for forfeiture the remedy is in the courts as it is not the province of this Commission to enforce compliance with conditions subsequently found in railroad charters."

This is the settled holding of the Commission on such questions.

In *Jones vs. St. Louis & San Francisco Railroad Company*, 12 I. C. R., 168, the court likewise held that it could

not enforce statutes except the Interstate Commerce Act, and in *Enterprise Mfg. Co. vs. Georgia Railroad Company,* 12 I. C. R., 428, is a similar holding.

The Attorney General of the Territory and State having the authority vested in such an officer at common law, the Interstate Commerce Commission not having jurisdiction to hear the case, an injunction was properly granted by the lower court.

(6) Did Statehood Extinguish Remedy?

The question then arises as to whether the Supreme Court of the State was correct in holding that the subsequent admission of the Territory to statehood lost whatever vitality there might have been before that time to the Federal acts granting right of way. It is to be noted that Section 4 reserved to Congress the right to regulate the charges for freight and passengers on said railway * * * until a State government shall exist in said Territory * * * and then such State government shall be authorized to fix and regulate the cost of transportation * * * of the freight within their respective limits by said railway. But Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railway * * * whenever such transportation shall extend from one state into another, or should extend into more than one state, provided, however, that the rate of such transportation of passengers shall not exceed the rate above expressed. * * * To all of this meaning must be given.

The first clause undoubtedly means that the railroad company shall not charge more than the laws of Kansas allowed it to charge in that State.

A second provision is that Congress reserves the right to regulate both interstate and Territorial rates until the time of statehood.

Third, that when statehood came the State shall have

the power to regulate intrastate rates, but Congress the interstate rates, but that the passenger fare, either local or interstate shall not exceed the rate given above. If before statehood the right of Congress to regulate rates was reserved by it, and at the same time the road was prohibited from charging more than was authorized by the laws of the State of Kansas, in order that both of these clauses may have meaning it must be concluded that in the event that Congress didn't fix the rates that the limit should be the limit fixed by Kansas, but that Congress should always have the right to fix a different limit, higher or lower, and that when statehood came the right to fix the limit for the intrastate rates was transferred to the state as a proper matter of local police power, but the right to fix the interstate rates remained as it was before in Congress; but that in no event should the passenger rates exceed the three cents provided in the first clause.

Now if it should appear in the case that after statehood the State had exercised its power of fixing rates, to allow the railroad to charge more than the rates authorized by the State of Kansas, and to allow the railroad to charge as much as it was alleged to be charging, then in such case the injunction granted below should have been modified by excepting from its provisions intrastate rates. But no pleading was filed alleging that such action had been taken by the State, and as a matter of fact it had not been taken. Likewise if it had been alleged, and was the truth, provided Congress had passed an act authorizing the road to charge more than that authorized by the laws of the State of Kansas and as much as it was alleged it was charging, such matter properly introduced in the pleadings would be cause for a modification of the injunction; but it is not alleged that any action was taken either by Congress or the State, nor in fact could it have been alleged, because such a thing to occur must be by law and such matter as the court would

take judicial knowledge of. As a matter of fact neither the State nor Congress had taken any action with reference to the rates involved, and the fact that under the law the State had the right to regulate the intrastate rates, would not lose the plaintiff the right to a remedy of injunction.

(7) The Enabling Act Retained All Remedies Not Specifically Abrogated.

The Enabling Act approved June 16, 1906, U. S. Statutes of 1905-6, Part 1, page 267, provided in next to the last clause thereof, being Section 21 thereof, that:

> "All laws in force in the Territory of Oklahoma at the time of the admission of the State into the Union, shall be in force throughout said State, except as modified or changed by this act or by the Constitution of the State, and the laws of the United States not locally inapplicable, shall have the same force and effect as elsewhere within the United States."

Under the law existing in the Territory of Oklahoma the plaintiff having a right at the time of trial in the lower court to the remedy therein given him, because the Oklahoma law was extended in force throughout the State until modified or changed by the Enabling Act or Constitution, the right to the injunction subsisted unless it can be found that the Enabling Act or Constitution took away that right. There is nothing in the Enabling Act that hints at such a suggestion, nor is there anything in the Constitution.

(8) The Constitution Preserved Remedies.

The Schedule of the Constitution, Section 1, provides:

> "That no existing rights, actions, suits, proceedings * * * or claims shall be effected by the change in the form of government, but all shall continue as

> if no change in the form of government had taken place. And all processes which may have issued previous to the admission of the State into the Union under the authority of the Territory of Oklahoma, or under the authority of the laws in force in the Indian Territory, shall be as valid as if issued in the name of the State."

Here is a specific provision that this suit should continue as if no change in the form of government had occurred. And again in Section 2 of the schedule it was provided:

> "All laws in force in the Territory of Oklahoma at the time of the admission of the State into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitations or are altered or repealed by law."

It cannot be shown that the right of the State to proceed by injunction as against a nuisance under the Federal Statutes named, was in any way altered, repealed, modified or changed. And by these two provisions, Sections 1 and 2, it was, therefore, provided that the suit should proceed to its determination as though there had been no change in the law or the form of government, unless there can be some provision found in the Constitution which necessarily and plainly takes away the remedy or the right.

(9) Only Where Commission Acted Did Its Power to Regulate Modify Suits.

The Supreme Court in its opinion points out that by Section 18, of Article 9, of the Constitution, the Corporation Commission was given power to supervise, regulate and control transportation in all matters relating to the performance of their public duties, and the charges therefor, and to

that end the Corporation Commission should prescribe and enforce such rates, charges and classification of traffic, and rules and regulations as may be reasonable and just, and from this the court deduces that the question of fixing intrastate rates is now entirely with the Commission, subject to appeal from its decision to the Supreme Court of the State. But the pleadings do not show that this right was ever exercised.

It was provided in Section 24, Art. 9, of the Constitution:

> "The right of any person to institute and prosecute in the ordinary courts of justice, any actions, suit, or motion against any transportation or transmission company, for any claim or cause of action against such company, shall not be extinguished or impaired by reason of any fine or other penalty which the Commission may impose, or be authorized to impose, upon such company because of its breach of any public duty, or because of its failure to comply with any order or requirement of the Commission; but, in no such proceeding by any person against such corporation, nor in any collateral proceeding shall the reasonableness, justness, or validity of any rate, charge, classification of traffic, rule, regulation, or requirement theretofore prescribed by the Commission, within the scope of its authority, and then in force be questioned. Provided, however, That no case based upon or involving any order of the Commission shall be heard or disposed of, against the objection of either party, so long as such order is suspended in its operation by an order of the Supreme Court as authorized by this Constitution or by any law passed in pursuance thereof."

This section of the Constitution specifically provided that a suit brought by any person, and, therefore, by the Attorney General, in any of the ordinary courts of justice, and therefore, pending in the Supreme Court of the State as the successor to the Territorial Supreme Court, should not be extinguished or impaired by reason of any fine or other penalty

which the Commission was authorized to impose. This is a specific provision that because the Commission can prescribe a rate and can punish for the failure to observe the rate, that the right to bring the action in an ordinary court shall not be impaired by the right of the Commission to punish. The only method provided to the Commission to enforce its orders is by a fine or penalty, and here it is provided that the action shall not be impaired by the fact that the Commission may impose a fine. This amounts to saying that the action shall not be impaired by the fact that the Commission may prescribe a rate and by fine enforce its regulation. And further said Section 24 provided that in any such proceeding the justness, reasonableness or validity of the rate prescribed by the Commission should not be questioned, but it is only a rate, "theretofore prescribed by the Commission within the scope of its authority and then in force" which shall not be questioned, and the pleadings no where in the case show that the Commission had theretofore prescribed a rate, and that it was in force. So that we have in this provision a definite enactment that the rights of the Commission to fix a rate, shall not impair a case unless that right has been exercised. The Commission is given the power to fix a reasonable rate under Section 18 aforesaid, but the Corporation Commission of the State of Oklahoma, just the Interstate Commerce Commission, would be compelled to hold that because it is only authorized to prescribe such rates, charges and classifications, and rules and regulations as would be reasonable and just—in other words as it is only authorized to enforce the terms of the Constitution within the limits of the authority given it, that it has no power any more than the Interstate Commerce Commission has to enforce the terms of the Federal Act granting right of way to the railway company. Relief under that must be sought in the courts.

(10) Authority to Fix Reasonable Rates Distinct from Authority to Enforce Contracts.

The power through the Corporation Commission to obtain a reasonable rate may be a different matter from the right given by the act to whatever advantage is given by the laws of the State of Kansas. A case involving some of the points is that of *Interstate Consolidated Street Railway Company vs. Commonwealth of Massachusetts*, No. 13, decided November term, 1907, 207 U. S., 79. That was a case where a street railway company is given a charter subject to all the duties, liabilities and restraints set forth in all general laws now or hereafter in force relating to street railway companies. A statute had previously been enacted that street railway companies must transport school children at reduced rates. It was claimed at the trial by the railway company that the statute was unconstitutional, in that it denied to the company the equal protection of the law, and deprived it of its property without due process of law. At the trial it was proven that the actual and reasonable cost of transportation per passenger was 3.86 or including taxes 4.10 cents; that pupils of the public schools formed a considerable part of the passengers carried by it. All of this was offered to prove that the rates were unreasonable, and if it had been offered before a court only authorized to fix a reasonable rate, it would have been a good defense, but this court, in passing on that matter, said:

> "A majority of the court considers that the case is disposed of by the fact that the statute in question was in force when the Plaintiff in Error took its charter, and confines itself to that ground. * * * There is no doubt that, by the law as understood in Massachusetts, at least, the provisions * * * if they had been inserted in the charter in terms, would have bound the corporation, whether such requirements could be made constitutionally of an already

existing corporation or not. The railroad company would have come into being and would have consented to come into being subject to the liability and could not be heard to complain."

Likewise, we take it, that the railway company having acquired its right of way grants from the government under a direct contention that it should not charge more than the amount authorized by the laws of the State of Kansas, that that condition is binding upon it, and it cannot complain, and there is no question of reasonableness to be considered in the matter, whereas, before the Corporation Commission the only question to be considered is that of reasonableness, and that the denial therefore by the Supreme Court of the State of the right to enforce these statutes in the customary way was a denial of a right given by a Federal statute.

(11) To Affirm Decision of Lower Court a Grave Disadvantage to the Public.

To strike out and render nugatory, as the decision of this court does, the very conditions under which the people of the United States granted to the railways free rights of way, through what has now become the State, would be to take away from the people of the State a right that may be worth millions of dollars. At any rate the petition in the trial court shows that rates were charged in excess of the express conditions of the grant. The right, therefore, arose to enforce the conditions of the grant by an injunction against such excessive charges.

These matters involve a very large amount of money. Every State has the right to regulate its State rates to the extent of requiring reasonable rates, whether or not the right of way was given the railroad by the public. Of the domain purchased from the French government to be held in trust by the people of the United States, out of which to erect

future states, the United States had a right to give portions to public service corporations for the purpose of building up the country and for public service. That it should attach to its grant a condition limiting the roads to a charge not greater than that it could make in neighboring states was altogether a reasonable requirement. It might well be that a rate would be reasonable in Kansas and yet because of the newness of the country unreasonable and too low in Oklahoma, but if the railroad took its grant upon the express condition that it should not charge in Oklahoma more than it could charge in Kansas, to take away the right of enforcing that condition is to deprive the State of Oklahoma of a right guaranteed by the Constitution and statutes of the United States.

This question not only involves this particular railroad, but as shown above practically every railroad entering the State received its right of way upon the same terms until the year 1902. As perhaps seventy-five per cent of the railway mileage was in the State previous to the year 1902, to take the force from these statutes is to give away three-fourths of the railroad right of way, being worth as it is many millions of dollars, and then to destroy the only equivalent required for this gift.

It is clear that this was not a moot question, but one actually existing. Statutory remedies never take away existing rights and remedies unless they must be necessarily so interpreted. The statement by the Oklahoma Supreme Court that this was a moot question was entirely beside the mark. Their reasoning is that the statutory remedies, through the Corporation Commission, were meant to exclude any other remedies, yet the Constitution of the State, as shown in Section 24 of the Constitution, expressly denied such a theory, and there being nothing hypothetical, but the only question being whether the remedies through the Corporation Commission are exclusive or cumulative, the

decision of the Supreme Court of the State had the necessary effect of depriving the State of its property guaranteed to it and given it by the statutes of the United States, vesting, therefore, in this court the power to reverse the lower court and direct it to enter up the proper judgment.

Respectfully submitted,

CHARLES WEST,
Attorney General of Oklahoma,
For the State.

[10955]

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1910

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, on the Relation of Chas. West, Attorney General, as successor to the Territory of Oklahoma.

Appellant,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Appellee.

No. 608.

NO. 13 ORIGINAL, THIS TERM, CONTAINS SAME QUESTIONS.

A part of the controversy in this case is the same as that argued in No. 13 Original, Oklahoma v. Atchison, Topeka and Santa Fe and submitted February 24, 1911. I

refer therefore to that argument, and to my original and supplementary briefs filed therein.

The opinion of the lower court is to be found in C. R. I. & P. Ry. Co. v. Territory, 21 Okla. 334, (97 Pac. 267), following case of same name and substantially same questions 21 Okla. 329, (97 Pac. 265).

FEDERAL QUESTIONS INVOLVED.

The pleadings in 21 Okla. 335, show that the case was rested squarely upon the federal statute. The Oklahoma court considered and passed upon the federal statute, p. 339-340, and denied that the limitations to the Kansas rate contained in the first sentence were operative after statehood.

THIS CONSTRUCTION REACHES A FUTILITY.

Its view is that the reservation of power to the State after statehood to fix and regulate intrastate rates renders ineffective the Kansas limit as to intrastate rates.

If the reservation to the state, after statehood, of the power to fix and regulate intrastate rates, repeals the Kan-

sas limit, then likewise the reservation of like power to Congress until statehood, must have wrought like havoc. The reservation to Congress, until statehood, of power over both intra and interstate rates, became effective at the same instant that the Kansas limit contained in the first sentence became effective. So that to adopt this view we find a limit in the first sentence (the Kansas limit) repealed by the potential regulation provided for in the second sentence, (reservation to Congress), so that the condition described by the court at page 339, "they (the limits) may have been vital enough at the time the cases were appealed." If they are not vital until the State regulates, they never were vital at all. This construction of a federal statute renders it nugatory.

CONSTRUCTION SHOULD SEEK VITALITY.

A similar condition of federal statutes, was passed upon in Atlantic & Pac. R. Co. v. U. S., 76 Fed. 186.

The limitation to the rates authorized by the laws of the State of Kansas for similar services is similar to the grant to the Atlantic & Pacific, (14 Stat. 292,) limiting that grantee (Sec. 5, Act of July 27, 1866),

> "Provided, that the said company shall not charge the government higher rates than they do individuals for like transportation and telegraphic service."

This limitation ran with the grant power. In that case, after establishing this charter maximum the Congress by Act of July 16, 1892, (27 Stat. 174-183) provided an appropriation for army transportation to land aided railroads, but that

> "in no case shall more than fifty per centum of the full amount of service be paid * * * this compensation shall be computed upon the basis of the tariff or lower special rates for like transportation performed for the public at large."

In Atlantic & Pac. R. Co. v. U. S., the question of the original charter maximum with the subsequent congressional limitation was considered by Judge Wellborn, who said, (p. 196):

> "I fail to discern the inconsistency here asserted between a present limitation which the proviso mentioned imposes, and reserved power in the government to make additional limitations if future exigencies should require. After the enactment of the company's charter, further governmental restriction upon rates could, of course, be imposed only by legislation, additional and subsequent to the charter. Such legislation might or might not be required. This, obviously, would depend upon whether the rates thereafter to be fixed and determined by the company were satisfactory, or otherwise to the government; and must, of necessity, be left to the developments of the future. In the meantime there was one limitation which Congress thought it expedient to impose at once, namely that the government should not be charged higher rates than individuals for like transportation and telegraphic service."

The limitation, then, to that of Kansas was what was deemed by Congress expedient for the time.

This limitation means

> "a greater rate of freight than the *lowest rate* authorized by the laws of the State of Kansas for services or transportation of the same kind,"

because section 7 of Act of August 2, 1882, granting similar right of way to St. Louis & San Francisco Railway Company (22 Stat. 182) limited the charges to

> "No greater rate of fare or freight * * * than the lowest rate authorized by law in the States of Arkansas and Texas, or either of them, for service or business of the same kind."

These Acts are to be considered as in *pari materia*, both dealing with grants of right of way to railways through the Indian Territory made about the same time.

The Act of August 2, 1882, by providing

> "that no greater rate of fare or freight shall be charged *in the Choctaw or Chickasaw Nations*,"

also makes clear why in the Act of July 4, 1884 the limitation was expressed as "charge *the inhabitants of said territory*." Because each of these descriptions exhausted the entire shipping public. Previous to the decision of Wabash, St. L. & P. Ry. Co. v. Ill. (118 U. S. 557, decided Oct. 25, 1886) many courts and lawyers thought that each state had the authority to control and regulate that part of an interstate journey which was within the limits of its boundaries.

Under this conception there was no separation into inter and intrastate administration and regulation. But the distinction firmly established in the Wabash case (*supra*) was abroad in the minds of many persons, and led to the separate provision in the Act of July 4, 1884, that after Statehood the Federal and State Government might separately fix charges within their separate authorities. Except for the presence of the dispute, settled not until 1886 by this Court, the provision as to what should happen after Statehood would probably not have been inserted at all.

Under grants establishing charter maxima, the claim had been made that the government, whether state or national, surrendered its rate making power. That was the contention made and denied in A. & P. R. Co. v. U. S., 76 Fed. 186.

Other instances where the claim was made are:

Stone et al. v. Farmers L. & T. Co., 116 U. S. 307;
Pingree v. Michigan Cent. R. Co., 76 N. W. 635.

A collection of cases passing on whether power to fix rates remained in the legislature or was granted irrevocably to the company, are found in the notes to

Winchester & L. T. Co. v. Croxton, 33 L. R. A 177 at p. 186, *et seq.*

Central Trust Co. v. Citizen's St. Ry. Co., 82 Fed. 1, is a case where unlimited power to the grantees as to charges had been given.

In Munn. v. Ill., 94 U. S. 113, the Chief Justice pointed out that the legislature might either (1) declare what shall be a reasonable compensation for such services, or (2), perhaps more properly speaking, fix a maximum beyond which any charge made would be unreasonable.

This distinction was pointed out by Mr. Justice Gray in Dow v. Beidleman, 125 U. S. 686.

The distinction between the charter maxima and separate legislative regulation was clearly put in

Ragan & Buffet v. Aiken, 9 Lea (Tenn.) 609.

The Stone case was decided Jan. 4, 1886, so that at the date of the Rock Island grant it was but recently settled. It was to head off forever this claim, influenced by the dispute settled by the Wabash case, that the reservation to Congress of power to regulate rates until Statehood, was inserted, with the separation thereafter to the dual system of government.

But Congress meant that in any event its limit as to passenger fares should not be made higher even by the future state, nor should the matter of compensation for mail be fixed by other discretion than that of Congress or the Postmaster General.

Congress thus attempted to settle all disputes it could foresee and attach a continuing condition to its grant.

See

City of Columbus v. Mercantile T. & D. Co., (decided in this court Dec. 12, 1910)

in which the court through Mr. Justice Lurton, speaking of a contract to supply the City of Columbus with water in consideration of agreements and grants made by the city says:

> "The simple object of the agreement was to obtain a constant and adequate supply of wholesome water. This was guaranteed in express terms, to say nothing of the necessary implication from the character of the contract. This guarantee was a continuing one, and dominated every other detail of the agreement."

In the Act of July 4, 1884, the national government was granting free the use of hundreds of miles of right of way in consideration of service at rates not to exceed a maximum expressed by reference. This is the whole public object and must be considered fundamental, continuing and of the very essence of the road's operation.

LIMITATION REFERS TO A CHANGING MEASURE.

As shown above, the grant to the St. L. & S. F. in Act of August 2, 1882, (22 Stat. 182) is to be construed as in *pari materia*. It provides a shifting base, i. e.,

> "the lowest rate authorized by law in the States of Arkansas and Texas, or either of them."

The measure is not what was the rate authorized by the laws of Kansas on the 4th of July, 1884, but the rate authorized at the time of the transportation.

See Snell, et al. v. City of Chicago, (Ill.) 8 L. R. A. 858 and 863. Here a grant was made to a toll road to collect the same tolls allowed by the General Law. It means the law as it is when the toll is collected.

Kugler's Appeal, 55 Pa. St. 123;
McKnight v. Crinnion, 22 Mo. 559.

The changing measure, itself argues a continuing condition.

LIMITATION FIXED BY REFERENCE TO KANSAS LAWS STILL CONTINUES.

Counsel for appellee must agree that the passenger fare is limited forever,—we say to a maximum charge of three cents per passenger mile.

STATE COURT CONFUSED POTENTIALITY WITH ACTUALITY.

As to freight, it does not appear in the pleadings that Congress has since the approval of the Act proceeded under

its reserve power to regulate rates, nor that since statehood either Congress or the State have so proceeded.

The only difference in the status of passenger fares and freight rates is that the latter might by Congress before statehood, or by Congress and the State since Statehood, each within its proper sphere, (Mo. Pac. v. Kansas, L. Coop. Advance Sheets, p. 338), be modified either *upward* or *downward*, whereas the former can only be modified *downward*.

Thus, it is clear that the State court has confused the power to fix and regulate, a potentiality, with the fact of fixing or regulation, an actuality.

The appellee does not contend that the State has either fixed or regulated rates. No such allegation is in the answer. Nor has any suggestion been made of that sort. While it is true that the State attempted such fixing, appellee's position therein is that it did not do so in fact and law.

ACT OF MARCH 2, 1887, (24 STAT. 447), A FEDERAL ACT DEALING WITH FEDERAL QUESTIONS.

The opinion of the State court refers to and follows (p. 340) its opinion in 21 Okla. 329.

A fundamental error in the former of the two cases is that asserted at page 332 that whatever rights existed to the Territory of Oklahoma to protect its inhabitants by injunction, that these rights were all superseded by statehood.

This cannot be, for the reason that this statute was enacted not alone under the power of the federal government to legislate for a territory. If the act rested upon that foundation alone, no doubt it could be superseded by the Constitution and laws of the State. It is, however, useless, to examine whether it was so superseded, though Section 24 of Article IX, would seem to settle that no such rights were superseded.

That Section provided:

> "The right of any person to institute and prosecute in the ordinary courts of justice, any action, suit, or motion against any transportation or transmission company, for any claim or cause of action against such company, shall not be extinguished or impaired, by reason of any fine or other penalty which the Commission may impose, or be authorized to impose, upon such company because of its breach of any public duty, or because of its failure to comply with any order or requirement of the Commission * * *"

This State court neither construed nor considered this provision.

Likewise another provision has the same effect here. Section 1 of the Schedule of the Constitution, provides:

> "In order that no inconvenience may arise by reason of a change from the forms of government now ex-

isting in the Indian Territory, and in the Territory of Oklahoma, it is hereby declared as follows:

"Section 1. No existing rights, actions, suits proceedings* * * shall be affected by the change in the forms of government, but all shall continue as if no change in the forms of government had taken place * * *

"Section 2. All laws in force in the Territory of Oklahoma at the time of the admission of the State into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law."

These provisions were neither construed nor considered by the State court.

There is no contention that the Act of March 2, 1887, has been altered or repealed, (except by the change in government), or that it is locally inapplicable. The theory is that it expires by its own limitation, or is inconsistent with the condition of statehood.

But the Act of March 2, 1887, was not adopted solely under the power of the federal government to legislate for the Territories.

This court held that a similar act for the Southern Kansas was under the power of Congress over interstate commerce, and under the power of Congress to legislate for the Indian.

Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641.

The court might also have rested the legislation on Article XI of the Treaty of 1866 with the Cherokees (14 Stat. 801), which gave permission to the federal government to grant rights of way through the Indian Territory to those railroads it should choose.

The Indian Treaties dedicated to a public highway such rights of way as the federal government should deem needful.

Land so dedicated in the Louisiana Purchase remains for public use, subject to control of the State in the execution of the trust for the public.

U. S. v. Ill. Central Co., 154 U. S. 239.

Neither the United States nor the State can divert the use of the highway or change its terms, (regulation is expressed as a condition, and thus does not change terms).

New Orleans v. U. S., 10 Peters 662.

Thus the federal and the state government could not co-operatively or separately change the nature of the trust created by the Treaty of 1866, (14 Stat. 801), and executed by the Act of March 2, 1887, (24 Stat. 447).

The Kansas limit must exist until state or federal legislation as to intra and interstate rates become an actual fact, not a potential fact. And even then as to passenger rates, three cents may never be exceeded.

ROCK ISLAND ESTOPPED.

The appellee by accepting benefits of grant is estopped from claiming that the grantor was without power to impose a condition plainly agreed to.

Interstate Consol. Street Ry. Co. v. Mass., 207 U. S. 79;
Reagan v. Trust Co., 154 U. S. at p. 393;
Central Trust Co. v. Citizen's St. Ry Co., 82 Fed. at p. 6;
Union Pac. Ry. Co. v. C. R. I. & P. Ry. Co., 163 U. S. at p. 564;
Newburyport W. Co. v. Newburyport, 193 U. S. at p. 578;
B. & O. R. Co. v. Maryland, 88 U. S. at p. 471;
Chicago Tel. Co. v. Ill. Mfgrs. Ass'n, 106 Ill. App. 54;
Simon & Son v. Md. Tel. Co., 63 L. R. A. 727:
Peo. v. Chicago Tel. Co., 77 N. E. 245;
Peo. v. R. Co., 178 Ill. 594;
Manning v. C. & P. Co., 18 App. D. C. 191.

Respectfully submitted,

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Attorney General of Oklahoma,

For the State.

Office Supreme Court, U. S.
FILED.
DEC 5 1910
JAMES H. McKENNEY,

In the Supreme Court of the United States

OCTOBER TERM, 1910

THE STATE OF OKLAHOMA, on the Relation of Charles West, Attorney General, as Successor to the Territory of Oklahoma,
Plaintiff in Error,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Defendant in Error.

No. 96

BRIEF FOR DEFENDANT IN ERROR

M. A. LOW,
Attorney for Defendant in Error.

The Western Printing Company, Topeka

In the Supreme Court of the United States

OCTOBER TERM, 1910

THE STATE OF OKLAHOMA, on the Relation of Charles West, Attorney General, as Successor to the Territory of Oklahoma,
Plaintiff in Error,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Defendant in Error.

No. 96

BRIEF FOR DEFENDANT IN ERROR

STATEMENT.

On the 10th day of October, 1906, the Attorney General of the Territory of Oklahoma commenced a suit in the name of the Territory, against the defendant in error, The Chicago, Rock Island and Pacific Railway Company, which will hereinafter be referred to as the Rock Island Company, by filing a petition in the District Court of Garfield County, in that Territory, in which it was alleged:

"That by act of Congress contained in volume 26 of the statutes at large, page 181, defendant, Chicago,

Rock Island and Pacific Railway Company, was granted and undertook all the burdens and rights granted to and imposed upon the Chicago, Kansas and Nebraska Railway Company, a corporation heretofore organized and incorporated under the laws of one of the States or Territories of the United States, which is unknown to plaintiff. That said last named corporation, Chicago, Kansas and Nebraska Railway Company, were granted right of way through the Territory of Oklahoma upon certain conditions; that all of these rights and conditions were transferred to defendant; that among said conditions by said act of Congress it was enacted that said defendant should not charge the inhabitants of said Territory a greater rate of freight than the rate authorized by the laws of the State of Kansas for services or transportation of the same kind."

It was further alleged that in violation of these conditions the Rock Island Company was continuously charging rates for the transportation of wheat larger than those authorized by the laws of the State of Kansas, for the shipping of such grain, and it was asked "that the defendant be forever restrained and enjoined from demanding, collecting, receiving or charging, directly or indirectly, for the transportation of freight and goods, according to local distance rates more than" a schedule of rates which was set out in the petition. Record, 9.

The defendant answered, denying generally the allegations of the petition, and setting up, as a further defense, that the court had no jurisdiction of the subject matter of the action, and that the Attorney General of the Territory had no jurisdiction or authority

to commence, maintain or prosecute the suit, for reasons stated in the answer. Record, 14.

Afterwards, on the 19th day of October, 1906, on the application of plaintiff, the Territory of Oklahoma, the court granted a preliminary injunction, enjoining the Rock Island Company, temporarily, from collecting rates for the transportation of wheat greater than those specified in the order. Record, 15.

From this order of the District Court of Garfield County, granting a preliminary injunction, the defendant appealed to the Supreme Court of the Territory, assigning for error that:

First. The said court had no jurisdiction of the subject of said action.

Second. The Territory of Oklahoma had no capacity to sue in the said action, or maintain the said action.

Third. The Attorney General of said Territory had no authority to maintain the said action.

Fourth. The said petition does not state facts sufficient to constitute a cause of action. Record, 8.

Afterwards, on the admission of Oklahoma Territory into the Union as a state, the case was transferred to the Supreme Court of the State of Oklahoma under the Enabling Act. Record, 21. After having heard the case the Supreme Court of the State of Oklahoma entered the following judgment:

"Supreme Court, May Term, 1908, June 22nd, 1908, Seventeenth Judicial Day.

No. 2086.

The Chicago, Rock Island and Pacific Railway Company, *Plaintiff in Error.*

vs.

The Territory of Oklahoma, *Defendant in Error.*

And now this cause comes on for final decision and determination by the court, upon the record and briefs submitted herein.

And the court having duly considered the same, and being fully advised in the premises, finds: That this cause should be dismissed.

It is therefore ordered and adjudged by the court, that this cause be and the same is hereby dismissed.

Opinion by Kane, J. All the Justices concur."

The court assigned its reasons for dismissing the suit in the opinion which is set out on pages 18 to 22, inclusive, of the record. The syllabus written by the court is as follows:

"The Supreme Court will not decide abstract or hypothetical cases disconnected from the granting of actual relief, or from the determination of which no practical relief can follow."

BRIEF.

I.

The Attorney General of Oklahoma Territory Was Without Authority to Institute This Suit, and the District Court of Garfield County Was and is Without Jurisdiction to Grant Any Relief Therein.

The Chicago, Kansas and Nebraska Railway right of way act, 24 Stat. 446, provides that the railway com-

pany shall not charge the inhabitants of the Indian Territory a greater rate of freight than the rate authorized by the laws of the State of Kansas for services and transportation of the same kind. In an action to enforce this provision of the act the inhabitants of the Indian Territory are the real parties in interest.

To paraphrase the language of this Court in *Missouri &c R'y Co. v. Missouri R'D &c Comrs.*, 183 U. S. 53, 59: The parties in interest are the railway company, on the one hand, and they who pay the freight, on the other hand. They are the real parties in interest, and in respect to whom the decree will effectively operate.

The persons for whose benefit the law was passed alone can sue to enforce their rights under it, in the absence of a statute authorizing a nominal party to sue in their interest.

Missouri Pacific Ry. v. United States, 189 U. S. 274.

United States v. Atchison, T. & S. F. Ry. Co., 142 Fed. 176, 187.

The laws of the Territory of Oklahoma did not, and the laws of the State do not, authorize the bringing of this suit by the Attorney General. Therefore, no relief can be granted herein. Neither the Territory of Oklahoma nor the Attorney General had any interest in the controversy, and neither the name of the Territory nor that of the State can be used in such a suit

without express authority of law. There is no such law.

In *State v. Huston*, 97 Pac. Rep., 982, the Supreme Court of the State of Oklahoma, construing the constitution and laws of that state, as well as the laws of the Territory of Oklahoma, held that the Attorney General has no power to bring suit in the name of the state, or to prosecute or defend the same, except when requested by the governor or either branch of the legislature. From this it follows that Attorney General Cromwell had no authority to institute the suit, and that no relief can be granted in such an unauthorized action.

The preliminary injunction issued by the District Court in this case was a nullity, and if the case were remanded to that Court it could only dismiss it for want of jurisdiction.

II.

The Decision of the Court Below Being Based on a Construction of the Constitution and Laws of Oklahoma as to the Jurisdiction of the Courts of That State, No Federal Question is Necessarily Involved, and the Writ of Error Should Be Dismissed.

The Supreme Court of Oklahoma dismissed this case because, in its opinion, under its Constitution, the State has authority to regulate the rates in question,

and because under the Constitution and laws of the State the Corporation Commission, and not the courts of the State, have authority to regulate such rates.

The case at bar is reported in 97 Pac. 267, and in the opinion it is stated that practically the same questions are raised in this case as were raised in No. 2085, *Chicago, Rock Island and Pacific Railway Company v. Territory of Oklahoma*, 97 Pac. 265. But in addition to the reasons assigned in that case the court, in its opinion in this case, said:

"The state government now has full power to regulate the charges for intrastate freight and passenger traffic on said railway, and we believe this case falls within the rule laid down in case No. 2085, supra, and on the authority thereof should be dismissed."

Case No. 2085 was a suit brought by the Territory against the defendant to enjoin it from collecting certain freight charges, on the ground that under the common law they were excessive and unreasonable. In that case, as in this, a preliminary injunction was granted by the District Court, from which an appeal was taken to the Supreme Court of the Territory; the case afterwards being transferred to the Supreme Court of the State. Without determining whether the suit could be maintained at common law, the court held that whatever the common law rule may have been, so far as it related to the fixing of a rate for carrying passengers or freight by common carriers, it had been superseded

by the Constitution and laws of the State of Oklahoma. In dismissing the case the court said:

"Taking this view of it, it will be seen, by the above quotation from the Constitution of the State of Oklahoma, that until changed by the Legislature, the question of fixing intrastate rates is now entirely with the corporation commission, subject to appeal from its decisions to the Supreme Court of the State. This being so, and the further fact that, since this suit was filed in the Supreme Court of the territory of Oklahoma, the territory of Oklahoma and Indian Territory have been erected into a state as the State of Oklahoma has so changed conditions that the settlement of the other questions raised could serve no useful purpose; nothing, so far as the record discloses, would be settled by a decision of this court, except who shall pay the costs."

It is evident that the judgment of the Court below dismissing this case is based upon a construction of the Constitution and laws of the State of Oklahoma, and not, solely, upon a construction of any federal statute. There can be no question of the correctness of the Court's ruling that the regulation of intrastate freight rates is now within the authority of the Corporation Commission of the State, but even though the court was wrong in so holding, such error can not be corrected here.

Hale v. Akers, 132 U. S., 554, 564, 565.

III.

The Supreme Court of Oklahoma Did Not Err in Holding That This Case Involved Only Abstract, Hypothetical Questions From the Determination of Which No Practical Relief Can Follow.

1. The petition filed in the District Court by the Attorney General did not state the semblance of a cause

of action, and, therefore, did not present for the determination of the court any real federal question.

The Chicago, Kansas and Nebraska Railway right of way act of March 2, 1887, provides that that company shall not charge inhabitants of the Indian Territory a greater rate of freight than the rate authorized by the laws of the State of Kansas for services or transportation of the same kind. A violation of this statute necessarily involved the fixing by the State of Kansas of a given rate for a given kind of service and transportation, and the charging an inhabitant of the Indian Territory a greater rate of freight for services and transportation of the same kind.

No such violation was alleged in the petition. It was alleged "that by the laws of the State of Kansas a rate for the transportation of freight, to-wit, wheat in said state is —," setting out a schedule of alleged rates. The existence of "a rate" does not imply that there are not other rates, which may be higher or lower than the rate singled out.

There is no showing that the services and transportation in Oklahoma Territory and Kansas are the same.

The court will take judicial notice of the laws of the State of Kansas; and that there was no law in that state, at the time this suit was brought, establishing freight rates for the transportation of wheat, as set out in said schedule, or otherwise. In the absence of such a law, the whole case falls.

2. When the act granting right of way to The Chicago, Kansas and Nebraska Railway Company was passed, there were only tribal governments in the Indian Territory, and Congress thought it necessary to insert the provision limiting rates until it should take some further action, or until there should be some regularly organized government, having authority to deal with such matters.

By its terms, the benefit of the provisions of the right of way act with respect to maximum freight rates was restricted to inhabitants of the Indian Territory, where there was no local authority to regulate such rates. Only inhabitants of the Indian Territory are within the letter or the spirit of this provision.

In May, 1890, Congress created the Territory of Oklahoma out of a part of Indian Territory, providing for a territorial government, with power to regulate railroads and their charges for carrying freight and passengers. Inhabitants of Oklahoma Territory ceased to be inhabitants of the Indian Territory. They were no longer within the letter or the spirit of the provisions of the right of way act under consideration.

By the act of June 29, 1906, 34 Stat. 584, Congress extended the provisions of the Interstate Commerce act to transportation by carriers between points in a territory, thereby giving the Interstate Commerce Commission authority to fix reasonable maximum rates, and to prevent discrimination in all territories.

Since this suit was instituted Oklahoma Territory and the Indian Territory have been admitted into the Union as a state, and this State now possesses, and is exercising, under the Constitution, plenary power to regulate intrastate commerce. The State now has a Commission of its own, clothed with ample power to fix intrastate freight rates.

Chicago, Rock Island and P. Ry. Co. v. Territory, 97 Pac. 265.

The rate provision in the right of way Act has ceased to be effective, not only by the terms of the Act, but under the provisions of the federal Constitution.

The extent of a right which no longer exists is not, as a future rule of action, a practical question, which the courts are bound to consider.

In *Mills v. Green*, 159 U. S., 651, 653, this Court said:

"The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."

United States v. Evans, 213 U. S. 297.

As a practical question, if this Court should reverse the judgment of the Supreme Court of Oklahoma, what order could it direct the latter Court to require the District Court to make in this case? Could the District Court properly be directed, at the suit of the Attorney General, who is not authorized to sue, and who has no

interest in the controversy, to usurp the functions of the Oklahoma legislature and the Oklahoma Corporation Commission, and to fix maximum rates for the future transportation of wheat between points in the State of Oklahoma, simply because Congress once said that until it should take further action, or until a State should be formed covering that Territory, rates should not exceed a certain limit?

It is respectfully submitted that the writ of error should be dismissed.

M. A. Low,

Attorney for Defendant in Error.

Office Supreme Court, U. S.
FILED.
MAR 10 1911
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 96.

THE STATE OF OKLAHOMA ON THE RELATION OF CHARLES WEST, ATTORNEY GENERAL, AS SUCCESSOR TO THE TERRITORY OF OKLAHOMA, PLAINTIFF IN ERROR,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, DEFENDANT IN ERROR.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

CHAS. WEST,
Attorney General of Oklahoma,
for the State.

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THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, DEFENDANT IN ERROR.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

A. Right of Attorney General to Institute the Action in the District Court.

In the brief of defendant in error it is claimed that the Attorney General of Oklahoma did not have the authority to bring this case in the district court. However, if the Attorney General appears

in the district court it will be presumed he was authorized.

> Leedy *vs.* Brown *et al.*, unreported, No. 1855; decided Nov. 16, 1910.

The court said in the syllabus (which is the law of the case under the Oklahoma Statutes, Compiled Laws of 1909, section 6087, Snyder):

> "When an action is commenced in the district court in the name of the State by the Attorney General, in the absence of an affirmative showing to the contrary, he is presumed to have brought such action after having been requested by the Governor or one of the branches of the legislature."

This holding was based upon State *vs.* Welbes, 11 S. D., 86; 75 N. W., 820, which in turn rests upon Jerauld Co. *vs.* Williams, 7 S. D., 196; 63 N. W., 905. So that even if this bill had been filed in a district court of the State as against a demurrer, at least the authority of the Attorney General need not be shown.

B. Remedy in Equity by the State or Territory.

Appellees cite The Missouri Pacific *vs.* United States. That case is not in point because that was a case where the right to bring a suit was not rested upon a threatened and continued violation of the property right given by a common law or by a statute, but expressly rested upon a request for a suit by the Interstate Commerce Commis-

sion, prior to the time that that Commission was given statutory authority to make such a request.

The case of United States *vs.* A., T. & S. F., in the Federal Reporter, is in this particular exactly like the Missouri Pacific case.

The case of Missouri Pacific Railway Company *vs.* Missouri Railway Board is not in point, because there the question was whether the State was actually a party of record so that it could be said it was an action against the State. The Missouri Railway Board had made an order upon the Missouri Pacific Railway, and upon its failure to comply had entered an action in the State court to enforce the same. The Missouri Pacific Railway appeared in the action and asked for the removal to the Federal court. This was denied by the State court, but granted by this court. That is all that was decided in that case.

Upon the question of the authority of the State to bring an action in equity to enjoin the collection of excessive rates, see:

> The Attorney General *vs.* Great Northern Ry. Co., 62 Eng. Reports, reprint, 337; S. C., 29; L. J. Ch., 794; 6 Jur. (N. S.), 1006; 8 W. R., 556.

It was said by the vice-chancellor:

> "Wherever the interests of the public are damnified by a company established for any particular purpose by act of Parliament acting illegally and in contravention of the powers conferred upon it, I conceive it is

> the function and duty of the Attorney General to protect the interests of the public by an information; and that where, in the case of an injury to private interests, it would be competent for an individual to apply for an injunction to restrain a company from using its powers for purposes not warranted by the act creating it, it is competent for the Attorney General in cases of injury to public interests from such a cause, to file an information for an injunction."

And then the court likens it to an injunction to abate a nuisance.

See Attorney General *vs.* Delaware R. Co., 27 N. J. Eq., 631;

Muncie Nat. Gas. Co. *vs.* City of Muncie (Ind.), 60 L. R. A., 822;

Gas Light Company *vs.* Zanesville, 47 Oh. St., 35;

Attorney General *vs.* Jamaica Pond, etc., 123 Mass., 361;

Attorney General *vs.* Chicago Railroad Company, 35 Wis., 425.

This is also recognized by the text writers:

Thompson, Private Corporations, 2d ed., secs. 5680 and 5721.

In the Federal courts the right to resort to equity to prevent an excessive charge as existing at the common law, was definitely affirmed in Tift *et al. vs.* Southern Railway Co., 123 Fed., 789, at 794. (The question of whether resort should first

be had to the Corporation Commission of the State will be treated later.)

In the State courts the right by injunction to prevent the exacting of unlawful and excessive rates was directly affirmed in State *vs.* Pacific Express Co. (Neb.), 115 N. W., 619, and cases cited, and

> City of Madison *et al. vs.* Madison Gas & Electric Co. *et al.* (Wis.), 108 N. W., 65, and cases cited.

The authority of the Abilene Cotton Oil Co., 204 U. S., 426; Southern Railroad *vs.* Tift, 206 U. S., 428; B. & O. vs. United States *ex rel.*, 215 U. S., 481, do not control this case because the Corporation Commission of the State of Oklahoma under section 18, article 9 of the Constitution of the State are only authorized to prescribe such rules, regulations, and classifications as may be just and reasonable. They have no affair with the question of the legality except as the same is produced by reasonableness and justness. The Interstate Commerce Commission has directly decided this question in Haines *vs.* C., R. I. & P. R. R. Co., 13 I. C. R., 214; Jones *vs.* St. L. & S. F. R. R. Co., 12 I. C. R., 168; Enterprise Manufacturing Co. *vs.* Georgia Railroad Co., 12 I. C. R., 248.

Upon the question of whether when public rights are granted a public service corporation with a maximum charge fixed in the grant for the use of the service:

1. Equity by injunction can relieve against charge beyond said maxima,

2. In a suit by a citizen for whose benefit the maxima were stated,

3. Irrespective of whether the resulting returns are adequate.

Chicago Tel. Co. *vs.* Illinois Mfg. Ass'n, 106 Ill. App., 54.
Simon & Sons *vs.* Md. T. and Tel. Co., 63 L. R. A., 727.
Peo. *vs.* Chicago Tel. Co., 220 Ill., 238; 77 N. E., 245.
Peo. *vs.* R. Co., 178 Ill., 594.
Manning *vs.* C. & P. Co., 18 App. D. C., 191.

The force of the last case is not broken by the reversal in 186 U. S., 238. The majority opinions did not cover this point. The dissenting opinion maintains the points.

C. The Decision of the State Court Does Not Rest Upon a Non-Federal Ground.

Appellees cite this court to the case of Hale *vs.* Akers. The rule of that case is in no way disputed, but the decision of the State court was that the rights created by the Federal act had been superseded by the Constitution of Oklahoma.

Whether the rights granted by Congress have been or could be superseded by the laws of a State is a Federal question. It necessarily determines the effect of the Federal law. Appellees have

really cited the point without intending it at page 7 of the brief, where they show that the State court did not determine whether the suit could be maintained at common law, but held that whatever the rule at common law might be, in case No. 2085, that it had been superseded by the Constitution and laws of the State, and so in this case they hold that whatever the rights were under the Federal law, that they had been superseded by the Constitution and laws of the State.

A refusal or failure to consider a Federal question is equivalent to a decision against the Federal right involved therein.

> Des Moines N. & R. Co. *vs.* Iowa Homestead Co., 123 U. S., 555.
>
> Erie Rr. Co. *vs.* Purdy, 185 U. S., 148.

In the Des Moines navigation case the Supreme Court of the State of Iowa held that the point was not raised before it by counsel for the defendant, and decided the case without considering that point, but this court examined the opinion of the court, the records, the briefs, and held that the point was raised before the Supreme Court of Iowa, and that the refusal of that court to consider it was a denial of the Federal right so set up.

The chief justice for this court said (p. 555):

> "We cannot look upon the reason given by the court below for not considering the question of prior adjudication as sufficient for avoiding the decision of a controlling Federal question, fairly presented by the

> pleadings, proofs and assignment of errors, and necessarily involved in the determination of the case. That question stood in the very front of the litigation, and, if decided in favor of the Navigation and Railroad Company, ended the whole matter. To give a judgment the other way, without considering it, was simply to ignore one of the most important elements of the case as it stood in the record. There can be no escape from this conclusion."

That language is equally applicable to the facts of this case. The court entirely failed to pass upon any of the questions raised by the railway, but of its own notion and of its own motion confused the power to regulate with the fact of regulation, and then erroneously held that the power to regulate superseded a right granted by Federal law, and that it was necessary, therefore, to consider what the right was.

D. The Petition Definitely Stated that it Rested Upon a Federal Law.

Judgment was rendered in the lower court pursuant to the law. The upper court held that the law had been superseded by the State law. This was a denial of the validity of an act of Congress.

Cunningham *vs.* Ashley, 14 How., 389.

If a State court so construes a State law as to make it conflict with the Constitution or laws of the United States, and thereby deprive a party of

his rights under such constitutional laws, a Federal right has been denied, such as this court can review on appeal.

Phœnix Insurance Co. *vs.* The Treasurer, 11 Wall., 204.

Under the last case, Mr. Justice Bradley said:

> "If the State court caused such a construction to a State statute as to make it conflict with the laws or the Constitution of the United States, and sustains its validity after giving it such construction, and thereby deprives a party of his rights under the Constitution and laws, then a Federal question is raised, and we can review the decision on the point of the validity of the statute."

By deciding that the Federal right had become a moot question, the State court denied the rights claimed thereunder.

Respectfully submitted,

CHAS. WEST,
Attorney General of Oklahoma,
for the State.